Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

LINDA DENNO, AS PARENT, LEGAL GUARDIAN AND NEXT FRIEND FOR WAYNE DENNO,
Petitioners,

V.

SCHOOL BOARD OF VOLUSIA COUNTY, DENNIS ROBERTS, AN INDIVIDUAL AND ROBERT WALLACE, AN INDIVIDUAL,
Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. For purposes of qualified immunity, can a constitutional right that has been clearly established by the Supreme Court be rendered unclear by after-the-fact decisions of lower courts?

2. Has this Court's decision in *Tinker v. Des Moines School District* been eroded by its ruling in *Bethel School District v. Fraser* so as to afford public school officials with unqualified immunity to ban student speech which the school officials deem to be "uncivil"?

3. Does a public high school student have the clearly established constitutional right to a symbolic, non-disruptive display of a four inch by four inch Confederate Battle Flag?

4. Under *Monell v. Department of Social Services*, can a School Board avoid liability under 42 U.S.C. §1983 by abdicating decisions regarding acceptable student speech to individual schools?

PARTIES TO THE PROCEEDING

Petitioners are Linda Denno as parent, legal guardian and next friend for her son Wayne Denno. Petitioners were plaintiffs in the United States District Court for the Middle District of Florida and appellants before the United States Court of Appeals for the Eleventh Circuit.

Respondents are the School Board of Volusia County, a public school board organized under the constitution of the State of Florida, Dennis Roberts, individually and as an employee of the School District of Volusia County, and Robert Wallace, individually and as an employee of the School District of Volusia County. Respondents were defendants and appellees below.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals in *Linda Denno, as parent, legal guardian and next friend for Wayne Denno v. School Board of Volusia County, Florida, Dennis Roberts, an individual, and Robert Wallace, an individual,* 218 F.3d 1267 (11th Cir. 2000).

OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals on panel rehearing is reported at *Denno v. School Board of Volusia County,* 218 F.3d 1267 (11th Cir. 2000) and set out hereinafter as Appendix A. The Eleventh Circuit's initial panel decision that was vacated by the *sua sponte* panel rehearing is reported at *Denno v. School Board of Volusia County,* 182 F.3d 780 (11th Cir. 1999) and set out hereinafter as Appendix B. The district court's unpublished summary judgment memorandum and order is set out hereinafter as Appendix C. *See Denno v. School Board of Volusia County, et. al,* No. 96-763-Civ-Orl-22 (April 29, 1998). The district court's order on motions to dismiss is reported at *Denno v. School Board of Volusia County,* 959 F.Supp. 1481 (M.D. Fla. 1997) and is set out hereinafter as Appendix D.

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals on panel rehearing was entered on July 20, 2000. This Petition for Writ of Certiorari is filed within ninety (90) days of the filing of that judgment.

A timely petition for rehearing *en banc* pursuant to Fed. R. App. P. 35 was filed with the Court of Appeals on August 8, 2000. As of the filing of this Petition for Writ of Certiorari, the Court of Appeals has yet to act on the petition for rehearing *en banc*. Prior to December 1, 1998, the pendency of a suggestion for rehearing *en banc* did not toll the time for a Petition for Writ of Certiorari. *See* Former Sup. Ct. R. 13.4 (1995); *Missouri v. Jenkins*, 495 U.S. 33, 46-47 (1990). It appears that the 1998 Amendments to the Federal Rules of Appellate Procedure alter this approach. Notwithstanding the presence of tolling, this Court has jurisdiction to entertain a Petition for Writ of Certiorari even if the judgment of the Court of Appeals is technically "non-final" while the petition for rehearing *en banc* is pending. *See* 28 U.S.C. §2101(e). Therefore, this Petition is both timely and mature.

Petitioners have elected to file the instant Petition early, even while their petition for rehearing *en banc* remains pending before the Court of Appeals, due to the pendency of a Petition for Writ of Certiorari in *West v. Derby Unified School District*, No. 99-2039 (filed June 19, 2000). Similar to the instant case, *West* involves the suspension of a public school student for drawing a Confederate battle flag in supposed violation of the

school board's anti-harassment and intimidation policy. Like the instant case, *West* poses important questions regarding the continued vitality of *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503 (1969), and its application to the non-disruptive display of Confederate battle flags. Thus, Petitioners have filed their Petition for Writ of Certiorari early so as to afford this Court an opportunity to consider both Petitions contemporaneously.

Federal jurisdiction is invoked pursuant to 28 U.S.C. §1331, the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. §1983.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment. The First Amendment states, in pertinent part:

> Congress shall make no law ... abridging the freedom of speech, or the press, or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment states, in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

> person within its jurisdiction the equal protection of the laws.

Petitioners instituted this civil rights action pursuant to 42 U.S.C. §1983 which states, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Since this case was decided by the district court on motions to dismiss and for summary judgment, the facts as set forth in the pleadings are deemed true and all other facts must be construed in favor of the Petitioners.

In December 1995, Wayne Denno ("Denno") was a student at Pine Ridge High School in Volusia County. Denno, a Civil War re-enactor, who portrays a Confederate artillery man, was displaying a small, four inch (4") by four inch (4") Confederate battle flag, Appendix E, while discussing historical issues of Southern Heritage in the Pine Ridge High School courtyard on December 13, 1995. This conversation occurred during the school lunch period when literally hundreds of students congregate in the courtyard.

Prior to December 13, 1995, there had been no history of racial strife or disturbance at Pine Ridge High School. Indeed, respondents concede that no students complained of Denno's innocuous display of this small Confederate battle flag prior to the actions of respondents. Denno did not use any racial epithets. Denno had no history of causing racial disturbances and is not affiliated with any controversial organization such as the Ku Klux Klan or neo-Nazis. To the contrary, Denno abhors the racist and hateful policies of such groups.

At that time, a school administrator approached a group of students in the vicinity of Denno demanding that they remove or put away apparel and other items bearing Confederate symbols. In turn, Denno was ordered to put away his small Confederate battle flag. When Denno attempted to explain the historical significance of the Confederate battle flag, he was ordered to the Pine Ridge High School Student Resource Center ("SRC") for disciplinary action. During his transportation to the SRC, respondent Roberts repeatedly told Denno to "shut up" when he attempted to explain his position and the historical and heritage significance attached to the Confederate battle flag. Further, Roberts stated that he considered the flag to be a "racist" symbol and that Denno had no "rights" while on school grounds. While being transferred to the SRC, Roberts informed Denno that he had been suspended.

Respondents failed to process Denno's suspension on December 13, 1995. Instead, Denno was sent home

at the end of school and instructed to report back to the SRC the next morning. Denno did so. While awaiting processing of his suspension, Denno observed another student being disciplined by Roberts relative to a display of the Confederate battle flag. In this instance, the student was wearing a T-shirt depicting the Confederate battle flag. The T-shirt did not contain any racial epithets. Roberts ordered this student to turn his shirt inside out so that the Confederate battle flag would not be visible. Believing this request to be wrong, Denno urged that the student refuse to comply. Again, Denno was accused of being disruptive and interfering with the discipline of another student. Denno was suspended for nine (9) days with a recommendation for expulsion[1]. Appendix F.

This suspension generated press reports criticizing the actions of the school administrators. The first press report was a December 15, 1995 *Orlando Sentinel* article. When the Principal of Pine Ridge High School, Sandra Rowe, learned of this newspaper article, she convened a meeting of a number of school administrators and other employees in the pre-school hours of December 15, 1995. During this meeting, Principal Rowe instructed that any student displaying or wearing a Confederate battle flag was to be suspended.

In accordance with Principal Rowe's edict, at least three other students were suspended for wearing or displaying the Confederate battle flag. These suspensions were again reported in the news.

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1 Ultimately, the school decided not to expel Denno.

In an effort to deflect negative criticism in the press for their actions, respondents filed a criminal complaint against Denno alleging that Denno was trying to incite a riot with his display of the four (4) inch by four (4) inch Confederate battle flag. Prosecutors elected not prosecute the matter further.

After returning to school, Denno sought to expunge the suspension. Petitioners met with Principal Rowe who declined the request without explanation. Through counsel, Petitioners immediately contacted the School Board's General Counsel to request further review by the Assistant Superintendent. They were ignored. When Petitioners' counsel then contacted the Assistant Superintendent directly,[2] he was informed that no formal review would be undertaken on the grounds that Petitioners had waited too long.

When the School Board refused to expunge Denno's suspension this civil rights case was instituted under 42 U.S.C. § 1983 claiming deprivation of Denno's constitutional civil rights secured by the First Amendment. Denno's complaint named the Volusia County School Board (the "School Board"), Pine Ridge High School Assistant Principal Dennis Roberts ("Roberts") and Pine Ridge High School Assistant Principal Robert Wallace ("Wallace") as defendants.[3]

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[2] Under Fla. R. Prof .Conduct 4-4.2, there existed a significant question as to whether Petitioners' counsel could contact the Assistant Superintendent directly insofar as counsel represented the School Board.

[3] Denno also asserted a common law claim for malicious prosecution resulting from the school officials' criminal complaint

The district court granted the respondents' motion to dismiss Denno's §1983 claims against Roberts and Wallace in their personal capacities on grounds of qualified immunity. In this regard, the district court concluded that the Confederate battle flag was "racially controversial" such that school officials were not unreasonable when banning the symbol. *Denno,* 959 F. Supp. at 1487 Appendix D12.

Thereafter, the district court granted the School Board's motion for summary judgment on grounds that the School Board could not be held liable for the actions of the Pine Ridge High School principal and assistant principals. *Denno,* Appendix C.

On appeal the Eleventh Circuit initially reversed the lower court's dismissal of the individual administrators on grounds of qualified immunity, but affirmed summary judgment in favor of the School Board. *Denno,* 182 F.3d 780 B. On *sua sponte* rehearing by the panel, the appellate court affirmed on all grounds, subject to the dissent of Judge Forrester. *Denno,* 218 F.3d 1267 Appendix A.

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filed against Denno as retribution for the resulting negative publicity.

REASONS FOR GRANTING THE WRIT

I.

FOR QUALIFIED IMMUNITY PURPOSES, A CONSTITUTIONAL RIGHT CLEARLY ESTABLISHED BY THE SUPREME COURT CANNOT BE RENDERED UNCLEAR BY AFTER-THE-FACT, NON-BINDING DECISIONS OF LOWER COURTS

The unusual appellate history of this case is, itself, the most compelling argument for granting the Writ. The core issue of whether Denno could seek vindication of his first amendment rights turns on the question of the school administrators' qualified immunity. Qualified immunity is unavailable if the school administrators have allegedly violated a "clearly established" constitutional right. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

In the appellate panel's original opinion, the appellate court recognized that *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503 (1969) held that public high school students possess the constitutional right to non-disruptive, symbolic displays (i.e. black arm bands protesting the Vietnam War) which may not be prohibited solely because of an "undifferentiated fear or apprehension of disturbance." *Id.* at 508. In reversing the lower court 's dismissal of Denno's claims against the school administrators, the appellate panel held that the "instant case involves facts materially similar to those in *Tinker*, and *Tinker* 'truly compels' the conclusion that Denno's federal right was violated." 182 F.3d at 785 B9.

On rehearing, without any intervening opinions of this Court or the Eleventh Circuit, the panel issued a diametrically opposed decision cloaking the school administrators with qualified immunity. In so doing, the majority held that a reasonable school official might conclude that *Tinker* is no longer "clearly established" law due to subsequent decisions of non-binding courts. *Denno,* 218 F.3d at ___ A14-16. As recognized by Judge Forrester in his dissent to the panel's opinion on rehearing, such a rule cannot be squared with controlling authorities from this Court.

The majority relied on the decisions of the Seventh Circuit in *Muller by Muller v. Jefferson Lighthouse School,* 98 F.3d 1530 (7th Cir. 1996) and a Kansas district court in *West v. Derby Unified School Dist. No.-260,* 23 F.Supp.2d 1223 (D. Kan. 1998), *aff'd* 206 F.3d 1358 (10th Cir. 2000)(petition for *certiorari* pending) to conclude that it would not be unreasonable for a school official to believe that s/he was allowed to ban the non-disruptive display of the Confederate battle flag notwithstanding *Tinker.* This reasoning is inherently flawed and warrants issuance of the Writ for at least three reasons.

First, the *Muller* and *West* decisions are non-binding precedents. In determining whether law is "clearly established," the court may not look to persuasive opinions when the law of the Supreme Court and circuit resolve the issue. *Cf. Wilson v. Layne,* 526 U.S. 603, 617 (1999)(suggesting that parties first look to "controlling authority in their jurisdiction" and then to persuasive authority); *see Jenkins by Hall v.*

Talladega City Bd. Of Educ., 115 F.3d 821, 826 n.4 (11th Cir. 1997)(*en banc*)(explaining that decisions from only the United States Supreme Court, Eleventh Circuit, or highest court of relevant state clearly establish law for purposes of qualified immunity). In view of *Tinker* and the binding circuit decisions in *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966), *Blackwell v. Issaquena County Bd. Of Educ.*, 363 F.2d 749 (5th Cir. 1966), and *Shamloo v. Mississippi State Bd. Of Trustees of Inst. of Higher Learning*, 620 F.2d 516 (5th Cir. 1980),[4] the law had been clearly established by controlling authorities, and cannot be rendered unclear by non-binding courts.

Second, both *Muller* and *West* were decided **after** the events of which Denno complains. Under *Davis v. Scherer*, 468 U.S. 191, 194 (1984), the determination of "clearly established" law for qualified immunity purposes is with reference to law existing at the time of the alleged constitutional violation, not subsequent law. *Accord Wilson v. Layne*, 526 U.S. at 617 (to be clearly established, there must be "cases of controlling authority in their jurisdiction at the time of the incident")

Third, both *Muller* and *West* provide, at best, *dicta* for the proposition that *Tinker* no longer applies. In *Muller*, the court was concerned with an elementary student's distribution of religious pamphlets to classmates. *Muller* did not hold that *Tinker* has been overruled, but rather that *Tinker* does not apply to

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[4] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981)(*en banc*), the Eleventh Circuit adopted as binding precedent all decisions rendered by the former Fifth Circuit prior to October 1, 1981.

elementary school students and that *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) permits a school to disassociate itself from certain potentially offensive speech by imposing reasonable restrictions on the distribution of pamphlets (as opposed to banning a student's non-disruptive display of a religious symbol).

Likewise, the district court's ruling (and that of the appellate court) in *West* does not hold *Tinker* to be archaic and non-binding. Rather, *West* adheres to *Tinker*, finding that there was actual evidence of violent disruptions justifying the prohibition of the display of the Confederate battle flag. Even if the *West* court's discussion of *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), could be manipulated into a criticism of *Tinker*, it is mere *dictum*.

If permitted to stand, the majority opinion on panel rehearing "would disrupt the balance that [this Court's] cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Davis v. Scherer*, 468 U.S. at 195. The balance would be disproportionately shifted in favor of public officials.

Rather than the standard of "objective legal reasonableness," *Wilson v. Layne*, 526 U.S. at 614 (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)), the appellate court would enlist the reviewing judge to cull through non-precedential decisions issued after-the-fact to advocate any holding or *dictum* that might arguably support the actions of the public official. If such tangential support could be found, the appellate court would ignore decisions of this Court and its own

circuit to conclude *a fortiori* that the public official must not have been unreasonable since at least one federal judge somewhere, at sometime has written words that might be construed as supporting the official's conduct. Such a rule transforms the "reasonable person" standard into a "clever student of arcane legal jurisprudence" test. *See also United States v. Lanier*, 520 U.S. 267, 270-71 (1997).

II.

TINKER HAS NOT BEEN ERODED BY *FRASER* SO AS TO AFFORD UNQUALIFIED IMMUNITY TO SCHOOL OFFICIALS WHO BAN STUDENT SPEECH THEY DEEM TO BE "UNCIVIL"

The cornerstone of the appellate majority's opinion on rehearing is the belief that *Fraser* has eroded the holding in *Tinker*. In *Tinker*, this Court held that neither "students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. Thus, it was unconstitutional to ban the passive, symbolic display of black armbands protesting the Vietnam War.

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, that deviates from the views of another person may start an argument or cause a

> disturbance. But our Constitution says we must take this risk.

Id. at 508.

Fraser upheld the suspension of a student who, during an official school assembly attended by 600 students ranging in age as young as 14 years old, made an offensive speech pervasively laced with explicit sexual innuendo. The *Fraser* Court found that the sanctions "[u]nlike the sanctions imposed on students wearing armbands in *Tinker*" were "unrelated to any political viewpoint," *Fraser*, 478 U.S. at 685; rather, the sanctions were designed to preclude vulgar and lewd speech that would otherwise undermine the school's basic educational mission.

The majority in the panel's rehearing seized upon Chief Justice Burger's language in *Fraser* (possibly *dicta* as argued by Judge Forrester in his dissent, *Denno*, 218 F.3d at ___ A36) to reach its conclusion that *Fraser* replaced *Tinker's* standard with a balancing test.

> "These fundamental values of 'habits and manners of civility' essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may by unpopular. But these 'fundamental values' must also take into account consideration of the sensibilities of the others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms

> must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.

Denno, 218 F.3d at ___ A8 (quoting *Fraser*, 478 U.S. at 681); *see also Denno*, 218 F.3d at ___ A17 ("To the extent that a reasonable school official viewed the relevant legal landscape as including the more flexible *Fraser* standard, the official would look not merely to the reasonable risk of disruption (the *Tinker* standard), but would also balance the freedom of Denno and the similarly situated students to advocate unpopular and controversial views against the school's interest in teaching the boundaries of socially appropriate behavior.").

Yet, this Court in *Fraser*, expressly ratified and reaffirmed its holding in *Tinker*. *Fraser*, 478 U.S. at 680 & 688 (Brennan, J., dissenting); *see also Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266 (1988)(where the Court expressly reaffirms the validity of *Tinker*). Indeed, the Court continues to cite *Tinker* as binding authority to this day. *Troxel v. Granville*, 120 S.Ct. 2054, 2072 n. 8 (2000).

If allowed to stand, the appellate panel's opinion on rehearing holds that school officials may ban speech which they deem to be "uncivil," *Denno*, 218 F.3d at ___ n.6 A16 - all in the name of teaching students the boundaries of socially appropriate behavior. By so holding, the appellate majority has established a subjective standard under which no school official's conduct may ever be deemed "unreasonable". Thus, the majority has *de facto* established a rule of

unqualified immunity for school officials in the realm of first amendment rights.

The ramifications are staggering. School officials may ban any and all symbolic speech with impunity. A Florida Gators' cap could be banned because a student with an affinity towards Florida State University might be offended. Crucifixes worn on a chain around the neck might be prohibited for fear of offending a Jewish student. A black armband protesting military involvement in Kosovo could be outlawed. Such would be a rather ironic epitaph for *Tinker*.

III.

A HIGH SCHOOL STUDENT HAS THE CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT TO THE NON-DISRUPTIVE DISPLAY OF A 4" X 4" CONFEDERATE BATTLE FLAG

In apparent disregard of this Court's instructions, the appellate majority refused to explicitly determine whether Denno or any other public high school student has the constitutional right to the non-disruptive display of a Confederate battle flag. *Denno*, 218 F.3d at ___ n.5 A15 & 16. "A court 'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether the right was clearly established at the time of the alleged violation.'" *Wilson v. Layne*, 526 U.S. at 609 (quoting *Conn v. Gabert*, 526 U.S. 286, 290 (1999)). "Deciding the constitutional question before addressing the qualified immunity question ... promotes clarity in the legal standards for

official conduct, to the benefit of both the officers and the general public." *Id.*; *accord County of Sacramento v. Lewis*, 523 U.S. 833, 840-42 n.5 (1998).

By dodging the issue, the appellate majority deprives future students of their first amendment right to such a symbolic display (assuming that such a right exists). Any future student who is punished for such a display will know that the school official will always be immune from suit since the panel's opinion on rehearing concludes that the law is "unclear" and then fails to clear it up! [5]

The allegations of Denno's complaint are *Tinker* incarnate.[6] The only variation is instead of a black armband, Denno displayed a tiny Confederate battle flag. Appendix E. To be sure, Denno's case is more compelling than *Tinker* since he was protesting nothing with his symbol.

This is not a case where Denno ran across the stage at a school assembly waving his flag. *See Fraser*. Denno did not emblazon his flag with profanity proclaiming F*CK YANKEES. *See Cohen v. California*, 403 U.S. 15 (1971). Denno did not even demand the

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[5] This presupposes that the Volusia County School Board will continue to abdicate its responsibilities to individual school administrators, and will never overtly ban such symbols. Certainly, in light of the opinion on rehearing there is no incentive for the School Board to take any action. It, too, is immune if it does nothing.

[6] This was originally conceded by the panel when it held that the "instant case involves facts materially similar to those in *Tinker*, and *Tinker* 'truly compels' the conclusion that Denno's federal right was violated." *Denno*, 182 F.3d at 785 B9.

right to publish an article in the school newspaper on the merits of secession. *See Kuhlmeier*. Denno merely sought to display his small Confederate battle flag during his lunch break while discussing his avocation of Civil War re-enacting and the history of that era. For his audacity, educators told him that the flag was "racist" and that he had no rights beyond the schoolhouse gate; he was rewarded with a nine (9) day suspension and had to fight expulsion and criminal charges of attempting to incite a riot.

Granting the Writ in this case (and, perhaps, the Writ in *West v. Derby Unified School District*, No. 99-2039 which is also before the Court) will allow this Court to answer fundamental and important questions. Is the Confederate battle flag protected symbolic speech like the black armbands in *Tinker* or is it so odious from its association with the institution of slavery and having been commandeered by hate groups that, like the swastika in Germany, it may be legally banned?[7] Have

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[7] In his dissent, Judge Forrester observes:

> The Confederate battle flag itself is a catalyst for the discussion of varying viewpoints on history, politics, and societal issues. Discourse on such issues, without the fear of undue government constraint or retaliation, is exactly what the First Amendment was designed to protect. *See Mills v. Alabama*, 384 U.S. 214, 218-19 (1966); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). Repressing this kind of discussion would be as unreasonable, and hopefully unthinkable, as a rule that forbids students to discuss the Constitution of the United States on the basis that it recognized slavery or forbids the display of the American flag because it has been carried by hate groups.
> *Denno*, 218 F.3d at ___ A42.

we entered an era in public education where "inculcating social values" is a euphemism for "political correctness?" Must we shield public school students from all risk of offense at the expense of informed debate, dialogue and exposure to divergent points of view?

IV.

UNDER *MONELL*, A SCHOOL BOARD CANNOT AVOID LIABILITY UNDER 42 U.S.C. §1983 BY ABDICATING DECISIONS REGARDING ACCEPTABLE STUDENT SPEECH TO INDIVIDUAL SCHOOLS

In *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978), this Court held that a governmental body may only be held liable under 42 U.S.C. §1983 if the wrongful conduct is undertaken as a matter of policy or custom. In this case, it is undisputed that the School Board had no established policy regarding the prohibition of student speech. Instead, the School Board merely enunciated the most general of statements.

> **Right to Free Speech and Publication.** RIGHTS. Students are entitled to freedom of expression of their views unless there are legal reasons to regulate their speech or publication. RESPONSIBILITIES. Students have the responsibility to refrain from the distribution or display of material which would cause conduct that would interfere with discipline or cause disorder.

VSCB Policy 208; *see* Fla. Stat. §230.20(6)(d).

The School Board abdicated all specific decisions as to acceptable and non-acceptable student speech to the individual schools. VSCB Policy 409. In this respect, this Court has recognized that policymaking authority may be shared among more than one official or body. *City of Praprotnik,* 485 U.S. 112, 125-26 (1988).

Nonetheless, the appellate court found that the decisions of the individual school principal and assistant principals did not constitute decisions by final policymakers solely because VSCB Policy 208 afforded Petitioners "the opportunity for meaningful review." *Denno,* 218 F.3d at ___ A22.[8] In reaching this conclusion, the appellate court ignored the absence of any historical review by the School Board of individual school principals' decisions to restrict student speech. Instead, the appellate court relied solely on a "catch-all" grievance procedure.

In *Praprotnik,* this Court did suggest that a public official's decision may not constitute final policy if it is subject to review by the authorized policymakers. *Praprotnik,* 485 U.S. at 127. By granting the Writ in this case, the Court will be permitted to clarify that meaningful review must be more that a "catch-all" grievance procedure (particularly one which is not

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[8] As a factual matter, the appellate court incorrectly concluded that the Dennos had failed to pursue a timely appeal. The evidence established, at the very least, a genuine issue of material fact as to whether the School Board consciously ignored a timely request for review, so as to assert untimeliness as a defense.

followed by the governmental body[9]). Rather, the actual delegated policy must be subject to affirmative review by the policymakers to assure that the subordinate's conduct is in conformance with *their* policy. *See id.* Otherwise, school boards could improperly insulate themselves from liability under §1983 simply by delegating all controversial decisions to individual schools subject solely to some non-functional, omnibus grievance provision.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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[9] It is significant that the School Board has never publicly criticized the Pine Ridge High School administrators' actions in banning the display of the Confederate battle flag. To this day, the School Board refuses to publicly recognize a student's right to the symbolic, non-disruptive display of a Confederate battle flag. Through inaction, the School Board has ratified the actions of the individual school administrators.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-2718

D. C. Docket No. 96-00763-CIV-ORL-22B

LINDA DENNO, as parent, legal guardian and next friend for Wayne Denno,

Plaintiff-Appellant,

versus

SCHOOL BOARD OF VOLUSIA COUNTY, FLORIDA; DENNIS ROBERTS, an individual, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(July 20, 2000)

ON PANEL REHEARING**

Before ANDERSON, Chief Judge, BLACK, Circuit Judge, and FORRESTER*, District Judge.

ANDERSON, Chief Judge:

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* Honorable J. Owen Forrester, U.S. District Judge for the Northern District of Georgia, sitting by designation.
**The previous opinion of this panel published at 182 F.3d 780 (11th Cir. 1999), was vacated and withdrawn and panel rehearing was ordered. *Denno v. School Board of Volusia County, Florida,* 193 F.3d 1178 (11th Cir. 1999).

Appellant, Linda Denno as parent and next friend for Wayne Denno ("Denno"), filed this complaint against Volusia County School Board ("Board") and Assistant Principals Dennis Roberts and Robert Wallace ("individual defendants") alleging deprivation of First Amendment rights in violation of 42 U.S.C. § 1983. With respect to the § 1983 claim against the individual defendants, the district court dismissed the complaint pursuant to Fed.R.Civ.P. 12(b)(6) on the basis of qualified immunity. With respect to the § 1983 claim against the Board, the district court granted summary judgment in favor of the Board. Denno appeals.

We address two discrete issues on appeal.[1] First, Denno contends that the district court erred in dismissing the § 1983 claim as to the individual defendants pursuant to Fed.R.Civ.P. 12(b)(6) on the basis of qualified immunity. Second, Denno argues that the district court erred in granting summary judgment in favor of the Board on the § 1983 claim. We address each issue in turn.

I. QUALIFIED IMMUNITY FOR THE INDIVIDUAL DEFENDANTS

Qualified immunity shields government officials from both suit and liability if their conduct violates no clearly established right of which a reasonable person would have known. *See Santamorena v. Georgia Military College*, 147 F.3d 1337, 1339-40 (11th Cir. 1998)(citing

[1] We reject Denno's other arguments on appeal without need for discussion.

Williams v. Alabama State Univ., 102 F.3d 1179, 1182 (11th Cir. 1997)). Elaborating on the qualified immunity standard, we have held:

> For qualified immunity to be surrendered, preexisting law must dictate, that is, truly compel, (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances.

Lassiter v. Alabama A&M Univ., 28 F.3d 1146, 1150 (11th Cir. 1994)(*en banc*). We also held in *Lassiter* that the qualified immunity standard sets up a bright-line test that is a powerful constraint on causes of action under § 1983. Quoting from and elaborating on *Dartland v. Metropolitan Dade County*, 866 F.2d 1321 (11th Cir. 1989), we noted:

When "no bright-line standard puts the reasonable public employer on notice of a constitutional violation, the employer is entitled to immunity except in the extraordinary case where [First Amendment case law] would lead to the inevitable conclusion that the [act taken against] the employee was unlawful." Unless a government agent's act is so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing, the government actor has immunity from suit.

Id. at 1149 (quoting *Dartland*, 866 F.2d at 1323-24). One way that a plaintiff can satisfy the qualified immunity

standard is to point to case law which predates the official's alleged improper conduct, which case law involves materially similar facts and truly compels the conclusion that the plaintiff had a right under federal law. *See Santamorena*, 147 F.3d at 1340.[2]

Whether the instant complaint alleges a violation of such a clearly-established right is a question of law subject to *de novo* review. *See Santamorena*, 147 F.3d at 1340. The district court dismissed Denno's claim against the individual defendants pursuant to Fed.R.Civ.P. 12(b)(6) based on qualified immunity. In the posture of this case, we are required to assume all reasonable inferences from the complaint in favor of Denno. *See id.* We briefly summarize the facts alleged in the complaint that are relevant to this issue.

At the time of the events giving rise to the instant case, Wayne Denno was a minor and a student at Pine Ridge High School. Dennis Roberts and Robert Wallace were assistant principals at that school. As a hobby, Wayne Denno had cultivated a keen interest in Civil War history. In his free time, Denno participated in Civil War reenactments and living histories. His hobby led him to join a reenactment group known as the Florida Light Artillery, Battery B, with which he participated in Civil War reenactments and living histories both within Florida and elsewhere in the South.

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[2] *Santamorena* notes that this is the usual rule, and notes possible exceptions. *Id.* at 1340 n.6.

On December 13, 1995, during an outdoor lunch break at school, Wayne Denno was quietly conversing with a small group of friends, discussing his avocation of Civil War history and his hobby as a Civil War reenactor. As part of this discussion, Wayne Denno displayed to his friends a 4" x 4" Confederate battle flag as he discussed historical issues of Southern heritage. Without any provocation or disruption, defendant Roberts approached and observed a couple of students with apparel bearing Confederate symbols. Without any explanation, defendant Roberts ordered the students to remove or cover the Confederate symbols on their apparel, and also ordered Denno to put away his small flag. When Denno tried to explain the historical significance of the flag, Roberts ordered Denno to accompany him to an administrative office and on the way there advised Denno that he was suspended from school. At the administrative office, another student was detained for wearing a tee-shirt displaying the Confederate flag, and ordered to turn his shirt inside-out so as to conceal the flag. Denno urged the student to adhere to his principles and not submit to the alleged violation of his First Amendment rights.

Denno's complaint alleges that his suspension constituted an unconstitutional deprivation of his First Amendment rights. As indicated in our elaboration above of the qualified immunity standard, pre-existing law must clearly establish the alleged constitutional right. Thus, we examine the legal landscape at the time of the individual defendant's actions. That legal landscape is dominated by two Supreme Court cases, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733 (1969), and *Bethel*

School Dist. No. 403 v. Fraser, 478 U.S. 675, 106 S.Ct. 3159 (1986).

In *Tinker*, several Iowa high school and junior-high school students were suspended for wearing black armbands to school in protest of the Vietnam War. The Supreme Court found that the students "merely went about their ordained rounds in school" and "neither interrupted school activities nor sought to intrude in the school affairs or lives of others" by their wearing of the black cloth. *Id.* at 514, 89 S.Ct at 740. The Court held that a student has a First Amendment right to display the armband at school, notwithstanding the school officials' fear that display of the symbol would create a disturbance, so long as there was no more than an "undifferentiated fear or apprehension of disturbance." *Id.* at 508, 89 S.Ct. at 837. On the other hand, the Court in *Tinker* indicated that school officials could have appropriately prohibited the display of the armband if there were circumstances that would warrant a reasonable fear on the part of the school officials that the display would appreciably disrupt the appropriate discipline in the school. *See id.* at 514, 89 S.Ct. at 740.

In 1986, the Supreme Court again addressed the First Amendment rights of students in public schools. In *Bethel Sch. Dist., No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, a high school student was disciplined following his speech to a school assembly nominating a fellow student for student elective office. The speech contained explicit sexual metaphor. The Court held that the school district was within its permissible authority in imposing the discipline. After stating that

one of the purposes of public education is to inculcate the habits and manners of civility as values conducive both to happiness and to the practice of self-government, the Court stated:

> These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of the others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.

Id. at 681, 106 S.Ct. at 3163. After noting that the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings, the Court stated:

> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution

> prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools." Tinker, 393 U.S. at 508, 89 S.Ct. at 737 .... The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.
>
> The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers - and indeed the older students - demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class.

Id. at 683, 106 S.Ct. at 3164.[3]

The issue before us with respect to the individual defendants is whether every reasonable school official in the same circumstances would have known in light of the preexisting law that his actions

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[3] We respectfully disagree with the dissent's suggestion that we are relying upon dicta from *Fraser*. We believe that the rationale reflected in our quotations from *Fraser* was relied upon by the Supreme Court in reaching its holding. It is this rationale that has significance for this appeal. *See infra.*

violated First Amendment rights. In other words, were the actions so obviously wrong, in light of preexisting law, that only a plainly incompetent school official or one who was knowingly violating the law would have done such a thing.

Such a reasonable school official would be charged with knowledge of *Tinker* and *Fraser*. In our attempt to identify the legal landscape that would have been apparent to such a reasonable school official, it is instructive to take note of the perspective of several reasonable jurists who have attempted to articulate the legal landscape in light of *Tinker* and *Fraser*.

In Muller *by Muller v. Jefferson Lighthouse School*, 98 F.3d 1530 (7th Cir. 1996), the Seventh Circuit was presented with a claim brought by an elementary school child challenging the school's restriction on the child's attempt to distribute, during non-instructional times, invitations to a religious meeting. The court upheld the school's restrictions, applying a flexible reasonableness standard, namely whether the restrictions were reasonably related to legitimate pedagogical concerns. *See id.* at 1540. The court rejected plaintiffs' argument, based upon *Tinker*, that the school was a public forum, with respect to personal intercommunication amongst students. Holding that intercommunication amongst students was indeed important, but was only one of many important school activities, the court stated:

> Supreme Court decisions since *Tinker* indicate that the teaching of civility and the inculcation of tradition moral, social, and

political norms may override student expression, or at least that it is permissible for a school board to so order its educational priorities. *Fraser*, 478 U.S. at 681 & 683, 106 S.Ct. at 3163 & 3164; *Hazelwood*, 484 U.S. at 271-72, 108 S. Ct. at 570-71.

Further, the potential "verbal cacophony" of a public forum, *see Cohen v. California*, 403 U.S. 15, 25, 91 S.Ct. 1780, 1788, can be antithetical to the delicate "custodial and tutelary" environment of an elementary school. *See Acton*, ___U.S. at ___, 115 S. Ct. at 2392. The cultivation of the "habits and manners of civility" that *Fraser* held "essential to a democratic society," 478 U.S. at 681, 106 S.Ct. at 3163, can require a level of parent-like guidance that has no place in a public forum. Declaring the elementary school classroom, hallway, or playground forums for unfettered student communication would require either a severe incursion into the critical educational mission of the elementary school or a substantial contraction of the First Amendment protections afforded speech in a public forum. Perhaps both. But neither alteration is necessary on the facts before us. In a public forum, the Christian can tell the Jew he is going to hell, or the Jew can tell the Christian he is not one of God's chosen, no matter how that may hurt. But it makes no sense to say that the overly zealous Christian or Jewish child in an elementary school can

> say the same thing to his classmate, no matter the impact. Racist and other hateful views can be expressed in a public forum. But an elementary school under its custodial responsibilities may restrict such speech that could a crush a child's sense of self-worth.

Id. at 1539-40. Thus, the Seventh Circuit, relying heavily upon *Fraser* applied a flexible reasonableness standard in analyzing a claim very similar to the claim made by Denno in the instant case.

In 1998 the United States Court for the District of Kansas addressed a challenge concerning a factual situation indistinguishable from the instant one. In *West v. Derby Unified School Dist. No. 260*, 23 F.Supp.2d 1223 (D. Kan. 1998), *aff'd*, 206 F.3d 1358 (10th Cir. 2000), the court addressed a challenge to a disciplinary action against a middle school student who had drawn and circulated a picture of the Confederate flag. The court, as have we, identified the two most relevant Supreme Court cases as being *Tinker* and *Fraser*. Because of the history of racial tensions in that school system, the court concluded that the school system adequately supported its policy prohibiting the display at school of the Confederate flag under the *Tinker* standard -- *i.e.*, the display would likely lead to a material and substantial disruption of the school's discipline. Of greater relevance to the instant case, however, the *West* court held alternatively that the school's policy was supported by the reasoning of *Fraser*. The court noted *Fraser's* "habits and manners of civility" language, and quoted *Fraser's* balancing test:

> "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the societies countervailing interest in teaching students the boundaries of socially appropriate behavior"

West, 23 F.Supp.2d at 1233 (quoting *Fraser*, 478 U.S. at 681, 106 S.Ct. at 3163). Applying that balancing test, the court held:

> Part of a public school's essential mission must be to teach students of differing races, creeds and colors to engage each other in civil terms rather than in "terms of debate highly offensive or highly threatening to others."... There is no evidence that the school district has attempted to suppress civil debate on racial matters, but the district had concluded that the display of certain symbols that have become associated with racial prejudice are so likely to provoke feelings of hatred and ill will in others that they are inappropriate in the school context.

Id. at 1233-34 (quoting from *Fraser*, 478 U.S. at 683, 106 S.Ct. at 3164).[4]

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[4] On appeal, the Tenth Circuit affirmed the district court and adopted the reasoning of the district court's first holding, *i.e.*, that under *Tinker* the restriction was permissible because, in light of past events at the school, "a student's display of the Confederate flag might cause disruption and interfere with the rights of other students to be secure and let alone." *West v. Derby Unified School Dist. No. 206*, 206 F.3d 1358,1366 (10th Cir. 2000). Although the

Thus, two courts viewing the relevant legal landscape have applied in analogous situations a more flexible reasonableness or balancing standard rather than, or in addition to, the *Tinker* standard of whether there is a reasonable fear of disruption. *See also Baxter by Baxter v. Vigo County School Corp.*, 26 F.3d 728, 736 (7th Cir. 1994) (citing *Fraser* and commenting "[s]ince *Tinker*, however, the Supreme Court has cast some doubt on the extent to which students retain free speech rights in the school setting").

In light of the holding and language in *Fraser*, and the interpretation of the *Tinker-Fraser* landscape by reasonable jurists, we cannot conclude that pre-existing law dictates or truly compels the conclusion that the *Tinker* standard should apply in the instant case to the exclusion of the *Fraser* standard. We have noted that it would be inappropriate to hold government officials to a higher level of knowledge and understanding of the legal landscape than the knowledge and understanding displayed by judges whose everyday business it is to decipher the meaning of judicial opinions. *See Bart v. Joyner*, 865 F.2d 1187, 1194 (11th Cir. 1989). The fact that reasonable jurists have applied *Fraser's* more flexible standard in cases similar to the instant case is a

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appellate court evidently found this holding more appealing, it did not disavow the alternative holding. Moreover, the fact that the district court judge found the legal landscape so unclear as to include the alternative *Fraser* holding discussed above remains strong evidence that the law was not clearly established that *Tinker* prohibited the individual defendants' actions, as opposed to the more flexible reasonableness or balancing standard of *Fraser* permitting them, in the instant case.

strong indication that a reasonable school official might see the *Tinker-Fraser* legal landscape as including the more flexible *Fraser* standard. Moreover, such a reasonable official might have noted that the *Fraser* opinion pointed out that the *Tinker* Court itself "was careful to note that the case did not 'concern speech or action that intrudes upon the work of the schools or the rights of other students.'" *Fraser*, 478 U.S. at 680, 106 S.Ct. at 3163 (quoting *Tinker*, 393 U.S. at 508, 89 S.Ct. at 737). Such official might have further noted that the *Fraser* Court contemplated that the "work of the schools" included the inculcation of fundamental values relating to the habits and manners of civility. *Id.* at 683, 106 S.Ct. at 3164. Thus, such a reasonable school official might have been led to the view that the legal landscape permitted application of the more flexible *Fraser* standard where the speech involved intrudes upon the function of the school to inculcate manners and habits of civility.[5] The instant case involves display

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[5] We realize that strong arguments can be mounted to the effect that the more flexible *Fraser* standard is limited to situations in which the speech involved is likely to be perceived as bearing the imprimatur of the school. *See Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 270-73, 108 S.Ct. 562, 569-71 (1988). However, we need not today decide the correct legal standard. Neither party has argued that we must decide the merits of the substantive constitutional issue before addressing qualified immunity. And we believe that this appeal is one of those exceptional cases in which we are not required to do so. *See Santamorena v. Georgia Military College*, 147 F.3d at 1342-43 (discussing the "better approach" of resolving the substantive constitutional issue first, and the relevant Supreme Court cases including *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708 (1998)). Thus, we need decide only whether pre-existing law dictates, that is, truly compels the conclusion that the *Tinker*

of the Confederate flag during school hours and on school premises. We do not believe that it would be unreasonable for a school official to believe that such displays have uncivil aspects akin to those referred to in *Fraser*, in that many people are offended when the Confederate flag is worn on a tee-shirt or otherwise displayed. [6] We cannot conclude that only a plainly incompetent school official would have viewed the instant circumstances as implicating legitimate school functions relating to civility, and thus subject to the school's authority under the more flexible *Fraser* standard to balance the freedom of one student to advocate unpopular and controversial views at school against the school's countervailing interest in teaching students the boundaries of socially appropriate behavior.

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standard applies to the exclusion of the *Fraser* standard. *See Lassiter*, 28 F.3d at 1150. We cannot so conclude.

[6] The fact that Denno alleges that he had no racist intentions, an allegation which we accept as true, is not dispositive. Similarly, it is not dispositive that common experience teaches us that the Confederate flag is honored by many people as a non-racist memorial to their Southern heritage; common experience also teaches that many people perceive the flag as offensive, constituting either a racist message or at least reflecting an uncivil lack of sensitivity to the sensibilities of many people. The more relevant factor is that the school official might reasonably think that other students would perceive the display as racist or otherwise uncivil. The issue also is not whether the official's perception is accurate or justified; rather, the issue is whether only an incompetent school official would have such a perception.

To the extent that a reasonable school official viewed the relevant legal landscape as including the more flexible *Fraser* standard, the official would look not merely to the reasonable risk of disruption (the *Tinker* standard), but would also balance the freedom of Denno and the similarly situated students to advocate unpopular and controversial views against the school's interest in teaching students the boundaries of socially appropriate behavior. We cannot conclude that the actions of the individual defendants in the instant case violated clearly-established First Amendment rights under the more flexible *Fraser* standard. Denno points to no case, binding or otherwise, in which materially similar actions of school officials have been held to violate First Amendment rights under the *Fraser* standard. Our research has uncovered no such cases.[7] As indicated above, the application of the *Fraser* standard in the instant case would involve balancing the freedom of Denno and the other similarly situated students to advocate unpopular or controversial views against the school's interest in promoting civil discourse amongst students at school. The balancing analysis under the *Fraser* standard would be analogous to that discussed by this court in a case involving a public employer's discharge of an employee because of the employee's comments to the press on matters of public concern. *See Dartland v. Metropolitan Dade County,* 866 F.2d 1321 (11th Cir. 1989). In granting summary judgment for the public official who fired Dartland, we described the analysis as follows:

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[7] Indeed, Denno does not argue that there was a violation of clearly-established First Amendment rights under the *Fraser* standard; he argues only that the *Tinker* standard applies to the exclusion of the *Fraser* standard.

> The Supreme Court has never established a bright-line standard for determining when the State as an employer may take action adverse to an employee in response to that employee's speech. Instead, the Court has balanced the interest of the employee in commenting on matters of public concern against the interest of the employer in performing public services efficiently. *Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35 (1968). The court must necessarily balance these interests on a case-by-case basis. Because of this case-by-case approach, "[t]here will rarely be a basis for [an] *a priori* judgment that termination or discipline of a public employee violated 'clearly established' constitutional rights" .... Because no bright-line standard puts the reasonable public employer on notice of a constitutional violation, the employer is entitled to immunity except in the extraordinary case where *Pickering* balancing would lead to the inevitable conclusion that the discharge of the employee was unlawful.

Id. at 1323 (quoting *Noyola v. Texas Dep't of Human Resources,* 864 F.2d 1021, 1025 (5th Cir. 1988)) (footnote omitted). Similarly, we cannot conclude that a *Fraser* balancing of the circumstances in the instant case would lead to the inevitable conclusion that the individual defendants here violated the First Amendment rights of the students. We cannot conclude that the prohibition of the displays of the

Confederate flag in this case are "so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing." *Lassiter*, 28 F.3d at 1149.

Thus, we affirm the district court's dismissal of the § 1983 claim against the individual defendants.[8] We turn to Denno's challenge to the district court's grant of summary judgment in favor of the Board.

II. LIABILITY OF THE BOARD

Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018 (1978), holds that local governments (and branches thereof)[9] may not be held liable for constitutional deprivations on the theory of *respondeat superior*. Rather, they may be held liable only if such constitutional torts result from an official government policy, the actions of an official fairly deemed to represent government policy, or a custom or practice so pervasive and well-settled that it assumes the force of law. *See id.* at 694, 98 S.Ct. at 2037-38; *Sewell v. Town of*

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[8] Denno argues that the district court erred in applying heightened pleading standard. In making this argument in the district court, Denno moved for a reconsideration and proffered an amendment to his complaint. We need not address Denno's argument; we have considered his complaint as if amended by this proffered amendment, and conclude that neither it nor the heightened pleading issue would affect our holding.

[9] School boards constitute branches of local government and thus may be subject to liability under *Monell*. *See Arnold v. Board of Escambia County*, 880 F.2d 305, 310 (11th Cir. 1989).

Lake Hamilton, 117 F.3d 488, 489 (11th Cir. 1997); *Church v. City of Huntsville*, 30 F.3d 1332, 1343 (11th Cir. 1994). In order for the actions of a government official to be deemed representative of the municipality, the acting official must be imbued with final policymaking authority. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 481, 106 S.Ct. 1292, 1299 (1986). Unlike the qualified immunity issue discussed above, the district court permitted the § 1983 claims against the Board to proceed beyond the pleadings stage; however, the district court granted summary judgment in favor of the Board.

Because Denno does not argue that the Board maintained any official policy prohibiting Confederate symbols, our resolution of this claim hinges on two issues: 1) whether the Pine Ridge High School administrators were officials vested with final policymaking authority, and 2) whether a custom or practice banning Confederate symbols existed. The district court answered both queries in the negative and accordingly granted summary judgment in favor of the Board. We agree with that assessment for the following reasons.

Final Policymaking Authority

Scala v. City of Winter Park, 116 F.3d 1396 (11th Cir. 1997), serves as our compass in the area of determining whether officials act with final policymaking authority so as to trigger entity liability under *Monell*. In *Scala*, drawing on *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915 (1988)(plurality opinion), we squarely held that "[f]inal policymaking authority over a particular subject area does not vest in an official whose decisions in the area are subject to

meaningful administrative review." *Scala*, 116 F.3d at 1401. With this "embedded" principle in mind, *id.*, we find Denno's argument that the school administrators possessed final policymaking authority unpersuasive.

Policy 208 of the Volusia County School Board, entitled "Code of Student Conduct and Discipline," sets forth a successive three-step grievance procedure for the resolution of "complaints filed by a student or parent/guardian with regard to their respective rights under school board policy, school rule, state or federal law." Step 1 involves meeting with the school principal informally; Step 2 involves review by the area assistant superintendent; and Step 3 permits a student to request a hearing if dissatisfied with the previous two steps. *See* Policy 208 at 14-15. In order to trigger review by the area assistant superintendent, the grievant is required to file a copy of the grievance form with the area assistant superintendent within 7 days of the meeting with the principal outlined in Step 1. *See* Policy 208 at 14.

The district court concluded that Policy 208, the "Code of Student Conduct and Discipline," provided for meaningful review of the school officials' disciplinary decisions, but concluded that Denno did not timely comply with the requirements for seeking review under Step 2. The court relied on Policy 208 itself and on a letter dated April 22, 1996, from Area Assistant Superintendent Lee Britton, stating that Denno had failed to pursue the appeal of his suspension in timely fashion and had therefore waived the opportunity to request the hearing mentioned in Step 3 of the grievance procedure. Indeed, it appears

that Denno did not pursue an appeal in timely fashion and never filed a copy of the grievance form necessary to proceed with Step 2 of the review procedure.

As a matter of law, we agree with the district court that the "Code of Student Conduct and Discipline" allowed for meaningful review of Denno's suspension. The fact that Denno had to file an appeal with the area assistant superintendent before his suspension could be reviewed does not make the school administrators final policymakers. *Scala* clearly states that this circuit equates meaningful review with the opportunity for meaningful review. *See Scala*, 116 F.3d at 1402 ("It is clear that [officials] do not become policymakers for § 1983 purposes simply because persons who disagree with their decisions have to file an appeal in order to have those decisions reviewed."). In other words, automatic review need not be made available when the opportunity for meaningful review is present. The express review mechanisms set into place by the grievance procedures detailed in the "Code of Student Conduct and Discipline" satisfy us that such opportunity existed in the instant case. Therefore, given the availability of this review, we agree with the district court that the Pine Ridge High School administrators were not final policymakers so as to make the Board liable under *Monell*.

B. Custom or Practice

In order for the Board to be held liable under the custom or practice prong of *Monell*, Denno must demonstrate that a custom or practice of banning the Confederate flag at high schools within the school

district is so well-settled and pervasive that it assumes the force of law. *See Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 489 (11th Cir. 1997). Put another way, Denno must show a "persistent and widespread practice" of prohibiting the Confederate emblem about which the Board knew or of which practice it had constructive knowledge, because "[n]ormally random acts or isolated incidents are insufficient to establish a custom . . . ." *Church v. City of Huntsville*, 30 F.3d 1332, 1345 (11th Cir. 1994) (quoting *Depew v. City of St. Marys*, 787 F.2d 1496, 1499 (11th Cir. 1986)).

The district court held that a custom of prohibiting the Confederate flag from being displayed on school grounds could not be attributed to the Board. While Denno correctly points out that three other students were disciplined for similar displays of the flag in December 1995, these incidents transpired in the immediate aftermath of Denno's suspension in an effort to maintain discipline amongst the students and did not represent a persistent and widespread practice of the Board.[10] Indeed, Wayne Denno's own testimony

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[10] Apparently, after Denno was suspended, the Dennos relayed the information to the local press. Pine Ridge Principal Sandra Rowe learned of the story covering Denno's suspension, and according to Denno, issued an unwritten ban of the Confederate flag to the faculty in a meeting held on December 15, 1995. The three other students who were disciplined after Denno for displaying the Confederate flag were disciplined subsequent to the December 15th meeting. However, for the reasons discussed above, the Principal was not a final policymaker, and for the reasons discussed in the text, there is no evidence that the unwritten ban was sufficiently pervasive or well-settled to have put the Board on notice.

undermines his argument that there was a custom or practice of banning the flag. Denno stated in his deposition that he had previously displayed the Confederate flag on school grounds and had not been disciplined and had witnessed others do so without consequence. In fact, Denno could not recall any student, prior to his suspension, suffering punishment for the display of the Confederate flag at Pine Ridge High School. Nor did Denno adduce evidence of similar suspensions at other schools within the school district governed by the Board. Given the lack of evidence with respect to the prohibition of the Confederate flag at Pine Ridge or at other schools within the district, we agree with the district court that Denno failed to adduce evidence creating a genuine issue of fact as to a pervasive and well-settled custom of banning the Confederate flag so as to make the Board potentially liable under *Monell*.

For the foregoing reasons, we agree with the district court that, under *Monell* and its progeny, the Board cannot be held liable. Thus, we affirm the district court's grant of summary judgment in favor of the Board.

III. CONCLUSION

We affirm the district court's Rule 12(b)(6) dismissal of Denno's § 1983 claims against the individual defendants and affirm the district court's grant of summary judgment in favor of the Board.

AFFIRMED.

FORRESTER, District Judge, concurring in part and dissenting in part:

The facts of this case raise at least two questions to anyone even minimally familiar with First Amendment jurisprudence. The first question, which immediately explodes into the mind, is whether the school official could require Denno to put away his flag. The majority makes an attractive case that the law, applied to our facts, was not clearly established on that point in December 1995. Because of this finding, the majority affirms the school officials' right to qualified immunity. The second question – whether Denno could be suspended from school for nine days for displaying the flag under the circumstances pled – does not so quickly engage the mind, but this is the issue presented to the court for decision. Denno seeks not a declaration of his right to his particular speech, but rather to relief from school-imposed discipline suffered on account of the content of his speech. Since at least 1966, case law binding on this circuit has prohibited student discipline on account of their speech unless the speech actually caused material and substantial disruption of the school environment.

Further Facts

In addition to the facts set out in the majority opinion, the following facts are pled in the complaint and are important to the issue before us. An assistant principal approached the group of students, which included Denno, because he saw that several students in the group had Southern symbols on their clothes. Only at that time did he notice Denno's flag. He told

Denno to put it away. Denno explained what he was doing, and the assistant principal told him to "shut up." The assistant principal said that he considered the flag a racist symbol. When Denno asked about his First Amendment rights, the assistant principal replied that Denno had no rights at the school. Denno was suspended in part for attempting to incite a riot because he paraded a Confederate flag during lunch period.

Equally important to this discussion are those facts not pled in the complaint. The complaint alleges no history of prior racial tension in the school. There is no contention that the school had an official policy specifically prohibiting Denno's conduct. There is no allegation that Denno's flag was seen by any African-American or other individual who might find the flag offensive ,[11] nor is there any allegation of student

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[11] Some could argue that the Confederate battle flag displayed by Denno would be inherently disruptive because Florida was a member of the Confederate States of America and the present population therefore consists in large part of the descendants of former slaves and the descendants of former slave owners, with the perceived animosities that allegedly result from such a mix. Although, as indicated, the complaint makes no allegations of disruption, to the extent it is thought relevant, the following legislative facts bear heavily upon the argument just mentioned. *See United States v. Bowers*, 660 F.2d 527, 530 (5th Cir. Unit B 1971) ("Legislative facts are established truths, facts or pronouncements that do not change from case to case but apply universally . . . ."). The demographics of Deltona, Florida, where Pine Ridge High School is located, show that only 2.98% of its population is African-American. *See General Population and Housing Characteristics for Deltona, Florida* (visited July 7, 2000) <http://factfinder.census.gov/java_prod/dads.ui.facCommunityFactsPage>. Moreover, a majority of Florida's present population traces its roots to somewhere other than the South. Only 24.7% of

misconduct at the time the flag was displayed, or afterward, as a result of Denno's having the battle flag. The question, as indicated, is whether on these facts the law was clearly established that Denno could not be disciplined for his speech.

"Clearly Established Law" and Qualified Immunity

One has only to survey the precedent relevant to the appeal at bar, and note the varying rationales of the many judges and justices who have written on the subject, to understand that a school official might have any one of a variety of subjective responses to the two questions presented here. Indeed, many people feel, especially in light of recent incidents of violence in our nation's schools, that the paramount role of school officials is to thwart even the most remote possibility of disharmony on the school grounds. Thus, a school official might personally feel that the inculcation of manners and civility warranted the actions taken by the school officials in the instant case. Our circuit, of

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the population was born in Florida, and another 14.7% was born in other Southern states. Lucy Morgan, *Newcomers Proud to Be 'Floridians'*, St. Petersburg Times, July 15, 1999, at 1B. Florida's population, therefore, cannot fairly be described as a direct product of the Old South, as might be said of states like Georgia, where 66% of the population was born within the state, or South Carolina, where nearly 70% of the population was born within the state. *See Social Characteristics for Georgia; Social Characteristics for South Carolina* (visited July 7, 2000) http://factfinder.census.gov/java_prod/dads.ui.facCommunityFactsPage. It should also be noted that the argument mentioned above presupposes that all white Southerners revere the flag and all black Southerners abhor it, presuppositions that are certainly questionable.

course, recognizes that it is to apply an objective standard when judging what reasonable officials would understand about the rights created by federal law, and "the government actor's intent or motivation are insignificant in determining entitlement to qualified immunity." *United States v. City of Lakeland, Fla.*, 203 F.3d 1288, 1291 (11th Cir. 2000). *See also Evans v. Hightower*, 117 F.3d 1318, 1320 (11th Cir. 1997); *Dolihite v. Maughon by and through Videon*, 74 F.3d 1027, 1041 (11th Cir. 1996); *Lassiter v. Alabama A&M Univ. Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994) (*en banc*); *Harris v. Coweta County*, 21 F.3d 388, 390 (11th Cir. 1994). It is the objective reasonableness of the official's actions, and not his wisdom or good faith, that determines whether immunity attaches.

The majority finds that the decision of the Supreme Court in *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), sufficiently clouded the prior decision in *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503 (1969), so that the right pronounced in *Tinker* was not clearly established at the time the school officials acted in this case. A school official could certainly utilize excerpts from *Fraser* to fashion an argument that the law was not clearly established, just as the majority has done. The question, however, is whether it would be reasonable for him to do so in light of existing precedent. We learned in the seminal case of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), that in practice, whether or not the law is clearly established is determined by the judge , and whether the official has properly determined it for himself is of no import. *Id.* at 818-19 ("If the law was clearly established, the immunity defense ordinarily should fail, since a

reasonably competent public official should know the law governing his conduct."). For the layperson, as well as for judges, confusion about the state of the law most often comes about by confusing the holding of a case with the *dicta* in the opinion. It is well established in this circuit, however, that *dicta* are of no assistance in determining whether or not law is clearly established for the purpose of qualified immunity. *Jones v. Cannon*, 174 F.3d 1271, 1288 n.11 (11th Cir. 1999); *Hamilton v. Cannon*, 80 F.3d 1525, 1530 (11th Cir. 1996).

Was the Law Clearly Established?

On July 2, 1966, the old Fifth Circuit Court of Appeals handed down the companion cases of *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966), and *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966).[12] In both cases, students in all-black schools were wearing and distributing buttons put out by the Student Nonviolent Coordinating Committee. In the *Blackwell* case, the buttons showed black and white hands joined and bore the word "SNCC." *Blackwell*, 363 F.2d at 750. In the *Burnside* case, the buttons had the words "One Man One Vote" and "SNCC." *Burnside*, 363 F.2d at 746. Both cases arose after students challenged the suspensions they received for incidents involving the buttons.

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[12] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions rendered by the former Fifth Circuit prior to October 1, 1981.

In the *Blackwell* case, the episode began when approximately 150 pupils came to school wearing the buttons. These buttons were distributed in the corridors and pinned on the students even though they were not requested. One younger student began crying. The principal brought the students to the cafeteria and informed them that they were forbidden to wear the buttons at school. Immediately thereafter, several students conducted themselves discourteously and displayed an attitude of hostility. On the following day, 200 students appeared wearing the buttons. They were assembled and told that if they returned the next day, they would be suspended. On the third day, students again returned to school wearing the buttons and were immediately sent home by the principal. One of the suspended students entered a classroom while class was in session and importuned another student to leave the class. A bus driver was going about the school building with a cardboard box full of buttons and distributing them, even in active classrooms. The district court found that there were numerous instances where students conducted themselves in a disorderly manner, disrupted classroom procedure, interfered with proper decorum and discipline of the school, and disturbed other students who did not wish to participate in wearing the buttons. On these facts, the court of appeals found the school action reasonable and affirmed the decision of the lower court to deny the issuance of a preliminary injunction enjoining the suspensions. *Blackwell*, 363 F.2d at 754.

In *Burnside*, a number of students came to school wearing the buttons. The principal told the entire student body that they were not permitted to wear

these buttons in the schoolhouse or in various classes. Despite this warning, three or four students appeared at school wearing the buttons the next day. All were given an opportunity to remove them. Three did not remove them and were sent home. Several days afterwards, 30 or 40 students came to school displaying these buttons. A teacher complained that they were causing a commotion, and the principal gave the students the opportunity of removing the buttons or going home. A large number of those elected to return home, and they were suspended. The court of appeals noted that other students only showed a mild curiosity over the insignia, and even the principal testified that the children were expelled not for causing a commotion or disrupting classes but for violating a school regulation. *Burnside*, 363 F.2d at 748. The court found that the regulation was arbitrary and unreasonable, and directed the district court to enter an injunction forbidding its enforcement. The court concluded with these comments:

> [W]e must also emphasize that school officials cannot ignore expressions of feelings with which they do not wish to contend. They cannot infringe on their students' right to free and unrestricted expression as guarantee[d] to them under the First Amendment to the Constitution, where the exercise of such rights in the school buildings and school rooms do not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.

Id. at 749.

The next decision relevant to our question is *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503 (1969). In this case, the United States Supreme Court reversed a decision by the lower court dismissing a complaint by several students who were suspended from school on account of wearing black armbands in protest of the war in Vietnam. The Court's holding rested on the absence of any evidence that the activity of the students materially disrupted class work or involved substantial disorder or invasion of the rights of others. *Id.* at 513. The case is the more remarkable for our purposes because it specifically bases its rationale on the Fifth Circuit's decisions in *Burnside* and *Blackwell*. *See id.*

After *Tinker*, the old Fifth Circuit was presented with a case involving the discipline of several Grambling College students. *See Jenkins v. Louisiana State Bd. of Educ.*, 506 F.2d 992 (5th Cir. 1975). Although the case was decided after the decision in *Tinker*, Judge Roney, writing for the court, said that the rule of decision was provided by *Burnside*, as expounded upon in *Tinker*. *Id.* at 1002. The record before the court contained evidence of students hurling bricks, stones and bottles at the women's dormitories and of a Volkswagen being overturned in front of the administration building and stripped of its hubcaps. The court said that the actions of the appellants in going about the campus shouting "organize," "unite," and "student power" subjected the teaching and learning atmosphere of the college to disruption, distraction and destruction. *Id.* at 1003. Finding the

actions of the students more akin to those in *Blackwell* than to either *Burnside* or *Tinker* because the students' conduct involved material and substantial interference with the requirements of appropriate discipline in the operation of an educational institution, the court found that the speech was not protected by the First Amendment. *Id.*

The line of authority on the question *sub judice* seemingly ends with *Shamloo v. Mississippi State Bd. of Trustees of Inst. of Higher Learning*, 620 F.2d 516 (1980). In *Shamloo*, a number of Iranian students demonstrated on campus on several occasions in support of the new government of the Ayatollah Khomeini, and were subsequently suspended. Noting that the students were disciplined for failing to comply with the university's regulations concerning student demonstrations, the appellate court identified a three-step inquiry for analyzing their First Amendment claim. First, the court needed to determine whether the regulations were actually violated. Next, the court needed to consider whether the university's action in suspending the students violated their First Amendment rights by punishing them for protected activity. Finally, the court needed to examine the constitutionality of the regulations at issue. *Id.* at 520. Finding that the students did in fact violate the regulations, the court of appeals moved on to the second inquiry. In resolving this issue, the district court found that the demonstrations had a disruptive effect with respect to other students' rights and confirmed the suspensions of the student demonstration leaders. The court of appeals, however, said that this finding by the district court was

insufficient to support the conclusion that the demonstrations were not protected by the First Amendment. According to the *Shamloo* decision, for conduct to be outside the protections of the First Amendment, a court must also find a material disruption of the classroom or that the conduct in question involved substantial disorder or an invasion of the rights of others. Put differently, for student demonstrations or other speech-related conduct to fall outside the protections of the Constitution, the conduct "must constitute a material and substantial interference with discipline." *Id.* at 522. Because the district court had made no such findings, the court of appeals could not say that the demonstration was not protected by the First Amendment, and in light of that conclusion, the court moved on to the final inquiry, striking down the regulations as unconstitutionally vague. *Id.* at 522-24.

It seems, therefore, after reviewing the aforementioned precedent, that this circuit has two pairs of decisions — *Blackwell* and *Burnside*, and *Jenkins* and *Shamloo* — clearly setting out the *sine qua non* for the disciplining of a student because of his or her speech. As these cases show, the necessary condition for such discipline is a material and substantial interference with the educational environment or with the rights of other students. *See also Tinker*, 393 U.S. at 513. It should be noted also that the outcome is not at all dependent on the content of the speech. This could not be clearer than in the first couplet, where the buttons constituting the students' speech were virtually identical.

What to Make of Fraser, Muller, and West

Much of the majority opinion's case for qualified immunity depends on *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530 (7th Cir. 1996), and *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358 (10th Cir. 2000). As demonstrated below, none of these decisions dilutes the clearly established law just discussed.

In *Fraser*, a student at a large high school assembly nominated a peer for class office in "elaborate, graphic, and explicit sexual metaphor." *Fraser*, 478 U.S. at 677-78. The assembly was a part of a school-sponsored educational program in self-government. The school had a disciplinary rule prohibiting the use of obscene language if the conduct materially and substantially interfered with the educational process. During the speech students hooted and yelled. The sexual activities alluded to were being graphically simulated by others. Some students were bewildered or embarrassed, and one teacher had to forego a portion of her class lesson the following day in order to discuss the speech with her pupils. After a hearing, Fraser was suspended for two days. The Supreme Court affirmed that action.

Fraser stands for the proposition that a student may be suspended for materially and substantially interfering with the educational process; it stands for the proposition that a student may be suspended for insubordination with reference to an established school rule which is reasonable; and it stands for the proposition that a public school has the right to disassociate itself from certain speech. *Id.* at 685; *see also*

id. at 680 (distinguishing *Tinker* on grounds that it "did not concern speech or action that intrudes upon the work of the schools or the rights of other students"). The rest of what Chief Justice Burger says in the majority opinion is *dicta* and, as such, does not bear on a determination of whether or not the law is clearly established for purposes of qualified immunity. It is, to be sure, an eloquent articulation of the role of school boards in inculcating civility, but it says nothing new that other courts have not said about the function of education. It is, in fact, an extension and elaboration on Chief Justice Burger's dissent in *Papish v. Bd. of Curators of the Univ. of Missouri*, 410 U.S. 667 (1973), where the Supreme Court, in a majority *per curiam* opinion, held that expelling a student for distributing a publication on campus that allegedly contained indecent speech was unconstitutional.

"*Dictum*" is a term that has been variously defined. *Dictum* may be defined as "a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding." *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988) (quoting *Sarnoff v. American Home Products Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986)). *Dictum* may be defined as a statement not necessary to the decision and having no binding effect. *See id.* (quoting *American Family Mut. Ins. Co. v. Shannon*, 356 N.W.2d 175, 178 (Wis. 1984)); Black's Law Dictionary 1100 (7th ed. 1999). *See also New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488, 1500 n.7 (11th Cir. 1993) (Edmondson, J., concurring) (suggesting that *dictum* is statement not squarely presented by facts and one not absolutely necessary to decision of concrete case before the court).

The Supreme Court has indicated that *dicta* are those statements that constitute neither the result of the case nor the portions of the opinion necessary to such result. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66-67 (1996). As Judge Posner has indicated, however, what is often at stake in distinguishing *dictum* from the holding of a case is that *dictum* is not authoritative. *Crawley*, 837 F.2d at 292. "So instead of asking what the word 'dictum' means we can ask what reasons there are against a court's giving weight to a passage found in a previous opinion." *Id.*

There are at least two reasons for labeling much of what is said in *Fraser* as *dicta*. First, Chief Justice Burger's statements about the mission of public education is written so broadly as to be considered an aside lacking the authority of binding precedent. The opinion sweepingly states that public education is to inculcate "fundamental values necessary to the maintenance of a democratic political system," *Fraser*, 478 U.S. at 681, and intimates that such fundamental values may be considered in determining the appropriateness of student speech. *See id.* at 683. Many, however, would consider patriotism a fundamental value, yet the Court held that arguably unpatriotic speech in *Tinker* was protected by the First Amendment. *Tinker*, 393 U.S. at 514. *Cf. West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that school could not compel students to salute American flag). Some might feel that promoting long-held American virtues such a freedom of religion and due process of law is a fundamental value, yet the predecessor of this circuit, at a time when American citizens were being held hostage, found protected

under the First Amendment speech in support of the Ayatollah's Iran, a theocratic state hostile to the United States. *Shamloo*, 620 F.2d at 522. These examples strongly suggest that the Court did not mean to endorse the full ramifications of Chief Justice Burger's sweeping statements about fundamental values.

Second, *Fraser*'s discussion of civility and values is not necessary to the decision in the case. As noted, the student's speech was disruptive and interfered with the maintenance of an orderly educational environment. Therefore, regardless of any discussion about civility and values, the disciplinary action was valid under *Tinker*. *See Tinker*, 393 U.S. at 513 (stating that student may express opinions "if he does so without 'materially and substantially interfer[ing] with the operation of the school' and without colliding with the rights of others") (quoting *Burnside*, 363 F.2d at 749). Further, as was said in both *Burnside* and *Blackwell*, on which the *Tinker* Court relied, a court is not to be concerned with the wisdom or expedience of the school's disciplinary action but whether such action is a reasonable exercise of the school's (that is, the government's) power to regulate. *Blackwell*, 363 F.2d at 754; *Burnside*, 363 F.2d at 748. The language in *Fraser* about civility and values is an exposition on the wisdom of the school's actions. All that was needed to decide the case, however, was a finding that those actions were reasonable because of the disruptive effect of the student's speech.

Not only is Chief Justice Burger's tribute to civility *dicta* in *Fraser*, it is not even the Supreme Court's own understanding of what was decided there. In

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988), it was said that *Fraser* stands for the proposition that a school is entitled to disassociate itself from speech that would demonstrate to others that such vulgarity is "wholly inconsistent with the 'fundamental values' of public education. *Fraser* at 686." In *Fraser* itself, the Court indicated that the decision stood for the proposition that a school has the authority to refuse to sponsor student speech that might reasonably be perceived as inconsistent with "the shared values of a civilized social order." *Fraser*, 478 U.S. at 683. For these reasons, *Fraser* does not muddy the clearly established law governing this case, where the student's speech was not disruptive, did not violate an established school rule, and could not be said to bear the imprimatur of the school.

The majority also cites to *Muller by Muller v. Jefferson Lighthouse School*, 98 F.3d 1530 (7th Cir. 1996), to support its contention that the law was not clearly established that Denno could not be punished for his symbolic speech. This heavy reliance cannot be justified. First, it is the decision of another circuit and thus of no aid to our appellees if the law of our circuit was clearly established to the contrary. *Cf. Wilson v. Lane*, 526 U.S. 603, 617 (1999) (suggesting that parties look first to "controlling authority in their jurisdiction" and then to persuasive authority). *See also Jenkins by Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 n.4 (11th Cir. 1997) (en banc) (explaining that decisions from only United States Supreme Court, Eleventh Circuit, or highest court of relevant state clearly establish law for purposes of qualified immunity). Second, it was decided after the incident in question and, therefore,

could not deconstruct the established law. *See Lassiter*, 28 F.3d at 1150 (noting that qualified immunity is surrendered only when "pre-existing law" clearly establishes right in question). Third, it deals with speech in a grammar school, not a high school, and the discussion of the need for parent-like custody in *Muller* is therefore not as persuasive. Fourth, the question before the *Muller* court was the reasonableness of a school code dealing with the distribution of publications on campus, not student discipline.[13] The case stands only for the proposition that this regulation

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[13] The regulation in question, Section 6144.11, stated in part:

> **Non-school-sponsored publications.** Publications produced by school district students without school sponsorship, or handbills, may be distributed and/or sold within the school according to the following procedure. 1. They must include the name of the sponsoring organization and/or individual. 2. A time and place for the distribution must be set cooperatively with the principal. 3. A copy must be given to the principal at least 24 hours before its distribution. 4. The publication shall contain this phrase: "The opinions expressed are not necessarily those of the school district or its personnel." 5. If the principal finds the publication (1) contains libelous or obscene language, (2) may incite (lead) persons to illegal acts, (3) is insulting to any group or individuals, or (4) he/she can reasonably forecast that its distribution to the students will greatly disrupt or materially interfere with school procedures and intrude into school affairs or the lives of others, the principal shall notify the sponsors of the publication that its distribution may not be started, or must stop. The principal shall state the reason for his/her decisions.

Muller, 98 F.3d at 1534.

was reasonable. It clearly does not stand for the proposition that student rights of free speech have been modified by *Fraser* or *Hazelwood*. Fifth, two of the three judges on the panel concurred only in the result (that the regulation was reasonable) and not with the analysis on the extent of the rights of pupils freely to express their ideas. For all of these reasons, *Muller* has no bearing on a determination of whether the school officials in this case are entitled to qualified immunity.

Finally, the majority makes reference to the district court opinion in *West v. Derby Unified School Dist. No. 260*, 23 F. Supp.2d 1223 (D. Kan. 1998). As the majority mentions, this case has now been decided by the Tenth Circuit. 206 F.3d 1358 (10th Cir. 2000). In that case (which, like *Muller*, was decided after Denno's suspension), a student was suspended for drawing and passing along a Confederate flag. He was suspended because his actions violated the "Racial Harassment and Intimidation" policy which had been adopted by the high school after a series of very serious racial incidents occurred. The policy prohibited students from having in their possession any written material that was racially divisive and included by way of example Confederate flags. The Tenth Circuit found the rule to be reasonable in that it was not the product of undifferentiated fear or apprehension, but rather was the product of the school officials' reasonable belief, based on past events, that the student's display of the flag would cause disruption. *Id.* at 1366. *Cf. Tinker*, 398 U.S. at 508.

There is no doubt that a school is always on a firm constitutional footing in adopting regulations that

impinge on student speech, where the regulations take into consideration legitimate pedagogical concerns and the atmosphere of the school. *See Bayless v. Martine*, 430 F.2d 873, 878-79 (5th Cir. 1970). In our case, the regulation of the speech was *ad hoc*, and the student was disciplined solely because of the content of his speech. Further, so far as our record goes, Denno's actual speech accompanying the display of the battle flag dealt with the historical aspects of the Civil War, one of the most significant and complicated periods in this nation's annals. The Confederate battle flag itself is a catalyst for the discussion of varying viewpoints on history, politics, and societal issues. Discourse on such issues, without the fear of undue government constraint or retaliation, is exactly what the First Amendment was designed to protect. *See Mills v. Alabama*, 384 U.S. 214, 218-19 (1966); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). Repressing this kind of discussion would be as unreasonable, and hopefully unthinkable, as a rule that forbids students to discuss the Constitution of the United States on the basis that it recognized slavery or forbids the display of the American flag because it has been carried by hate groups.

But the reasonableness of school regulations that enact notions of political correctness *au courant* in the name of inculcating students with civility is not the issue for this dissent. It is, instead, whether in 1995 it was clearly established that a student could not be disciplined because of the content of his speech. The law of this circuit clearly answers that the student is at the mercy of the consequences of his speech, and if the speech occasions a material disruption of class work or

substantial disorder, he may be punished; otherwise, he may not. Nothing in the court's opinion establishes that this proposition was seriously in doubt in 1995.

Finally, I agree with the majority's ruling as to the liability of the Board and join that portion of the majority opinion *in toto*.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-2718

D. C. Docket No. 96-763-CIV-ORL-22B

LINDA DENNO, as parent, legal guardian and next friend for Wayne Denno,

Plaintiff-Appellant,

versus

SCHOOL BOARD OF VOLUSIA COUNTY, FLORIDA; DENNIS ROBERTS, an individual, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(July 26, 1999)

Before ANDERSON, Chief Judge, BLACK, Circuit Judge, and FORRESTER*, District Judge.

ANDERSON, Chief Judge:

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* Honorable J. Owen Forrester, U. S. District Judge for the Northern District of Georgia, sitting by designation.

Appellant, Linda Denno as parent and next friend for Wayne Denno ("Denno"), filed this complaint against Volusia County School Board ("Board") and Assistant Principals Dennis Roberts and Robert Wallace ("individual defendants") alleging deprivation of First Amendment rights in violation of 42 U.S.C. § 1983. With respect to the § 1983 claim against the individual defendants, the district court dismissed the complaint pursuant to Fed.R.Civ.P. 12(b)(6) on the basis of qualified immunity. With respect to the § 1983 claim against the Board, the district court granted summary judgment in favor of the Board. Denno appeals.

We address two discrete issues on appeal.[1] First, Denno contends that the district court erred in dismissing the § 1983 claim as to the individual defendants pursuant to Fed.R.Civ.P. 12(b)(6) on the basis of qualified immunity. Second, Denno argues that the district court erred in granting summary judgment in favor of the Board on the § 1983 claim. We address each issue in turn.

I. QUALIFIED IMMUNITY FOR THE INDIVIDUAL DEFENDANTS

Qualified immunity shields government officials from both suit and liability if their conduct violates no clearly established right of which a reasonable person would have known. *Santamorena v. Georgia Military College*, 147 F.3d 1337, 1339-40 (11th Cir. 1998)(citing

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[1] We reject Denno's other arguments on appeal without need for discussion.

Williams v. Alabama State Univ., 102 F.3d 1179, 1182 (11th Cir. 1997)). Whether the complaint alleges the violation of such a right is a question of law subject to *de novo* review. *Id.* The district court dismissed Denno's claim against the individual defendants pursuant to Fed.R.Civ.P. 12(b)(6) based on qualified immunity. In the posture of this case, we are required to assume all reasonable inferences from the complaint in favor of Denno. *Id.* We briefly summarize the facts alleged in the complaint that are relevant to this issue. At the time of the events giving rise to the instant case, Wayne Denno was a minor and a student at Pine Ridge High School. Dennis Roberts and Robert Wallace were assistant principals at that school. As a hobby, Wayne Denno had cultivated a keen interest in Civil War history. In his free time, Denno participated in Civil War reenactments and living histories. His hobby led him to join a reenactment group known as the Florida Light Artillery, Battery B, with which he participated in Civil War reenactments and living histories both within Florida and elsewhere in the South.

On December 13, 1995, during an outdoor lunch break at school, Wayne Denno was quietly conversing with a small group of friends, discussing his avocation of Civil War history and his hobby as a Civil War reenactor. As part of this discussion, Wayne Denno displayed to his friends a 4" x 4" Confederate battle flag as he discussed historical issues of Southern heritage. Without any provocation or disruption, defendant Roberts approached the small group of Denno's friends, noticed that Denno was holding the 4" x 4" Confederate flag, and ordered Denno to put the flag away. When Denno tried to explain the historical significance of the

flag, Roberts ordered Denno to accompany him to an administrative office and on the way there advised Denno that he was suspended from school. Denno alleges that his suspension constituted an unconstitutional deprivation of his First Amendment rights.

The law relevant to this issue begins with *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733 (1969). In *Tinker*, several Iowa high school and junior-high school students were suspended for wearing black armbands to school in protest of the Vietnam War. The Supreme Court found that the students "merely went about their ordained rounds in school" and "neither interrupted school activities nor sought to intrude in the school affairs or lives of others" by their wearing of the black cloth. *Id.* at 514, 89 S.Ct at 740. The Court held that a student has a First Amendment right to display at school a symbol, such as the one at issue in the instant case, notwithstanding the school officials' fear that display of the symbol would create a disturbance, so long as there was no more than an "undifferentiated fear or apprehension of disturbance." *Id.* at 508, 89 S.Ct. at 837. On the other hand, the Court in *Tinker* indicated that:

> To justify prohibition of a particular expression of opinion, it [the state in the person of the school official] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly, where there is no finding and no showing that engaging in the forbidden

> conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" the prohibition cannot be sustained

Id. at 509, 89 S.Ct. at 738. (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). Therefore, *Tinker* clearly establishes the law: a student has a right to display a symbol which, although it might reflect an unpopular viewpoint and evoke discomfort and unpleasantness, reasonably gives rise to nothing greater than an undifferentiated fear or apprehension of disturbance. On the other hand, we construe *Tinker* to indicate that school officials could appropriately prohibit the display of a symbol in circumstances that warrant a reasonable fear on the part of the school officials that the display would appreciably disrupt the appropriate discipline in the school. *Id.* at 514, 89 S.Ct. at 740 ("[T]he record does not demonstrate any facts which might have reasonably led school authorities to forecast substantial disruption of or material interference with school activities . . . .").[2]

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[2] The Former Fifth Circuit has also addressed the appropriate balance between student expression and schoolhouse discipline, doing so in *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966) and *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966), both cited by the Supreme Court in *Tinker*. *See Tinker*, 393 U.S. at 504 n.1, 509, 513, 89 S.Ct. at 735 n.1, 738, 740. The *Tinker* Court found it "instructive" that the same Fifth Circuit panel upheld the students' right to wear "freedom buttons" in *Burnside*, but declined to do likewise in *Blackwell*, in opinions written by Judge Gewin and issued on the same day, because in *Burnside* there was no indication that the buttons would cause any material disruption of school activities, whereas in *Blackwell* there was a high degree of disturbance emanating from the wearing of the "freedom buttons." *Tinker*, 393 U.S. at 504 n.1, 509, 89 S.Ct. at 735

In applying the foregoing law to the instant case, we emphasize the posture in which this case comes to us: a dismissal of the complaint pursuant to Fed.R.Civ.P. 12(b)(6). In such posture, we of course assume all reasonable inferences in favor of Denno. See *Santamorena*, 147 F.3d at 1340. From the specific facts pled in the complaint, and summarized above, and the reasonable inferences therefrom, we construe the complaint as alleging that as of the time that Defendant Roberts interrupted Denno's small group discussion: Denno was displaying the flag in a quiet, unobtrusive manner to a small circle of friends during a lunch break in the school courtyard while discussing his avocation as a Civil War reenactor; he neither attempted to parade nor brandish the flag in a provocative manner; there had been no disruption in the school attributable to Denno's actions or similar occurrences;[3] and there had been no history of racial tension or disorder at Pine Ridge High School.[4]

Given the alleged context of Denno's small group discussion-a small, quiet and confined discussion

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n.1., 738.

[3] Nothing in this opinion should be construed as suggesting that school officials cannot reasonably prohibit the display of a symbol without having experienced a prior disturbance. Rather, the *Tinker* test is whether the circumstances warrant a reasonable fear of disruption. We note the alleged absence of past disruption in the instant case merely as one factor amongst the alleged circumstances and one factor in Denno's showing that there was no reasonable fear of disruption in this case.

[4] Indeed, Denno's proffered amendment to the complaint expressly alleged that no history of racial tension or disorder existed at Pine Ridge High School.

amongst Denno and his friends of Civil War history and Denno's hobby as a Civil War reenactor-and given the alleged absence of any disruption or racial tension at the school, we conclude that Denno's complaint, if its allegations and its reasonable inferences are accepted as true, adequately alleges that there would have been no reasonable fear of disruption on the part of the school officials. We therefore conclude that Denno's complaint describes actions with respect to which *Tinker* has clearly established a student's First Amendment right. Considering only the allegations of Denno's complaint and the reasonable inferences therefrom in favor of Denno, we conclude that Denno has alleged a violation of the very First Amendment right that *Tinker* clearly established.[5]

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[5] We recognize that, after Denno had been suspended by defendant Roberts as Roberts was taking Denno to the administrative offices, the formal suspension notice which was later issued cited not only the flag incident which is the focus of this opinion, but also cited insubordination as a ground for the suspension. The insubordination ground was apparently based upon a discrete incident occurring subsequent to the flag incident. Several reasons persuade us that the possible insubordination incident would not provide an appropriate ground for affirmance at this stage of the litigation. First, we see no indication that the district court relied upon the insubordination ground; second, even if the subsequent developments in this case reveal that the defendants should prevail on the insubordination ground, it is possible (depending, *inter alia*, upon whether Denno's allegations are borne out by subsequent factual development) that the initial suspension of Denno by Roberts may still be found to violate Denno's First Amendment rights and warrant some remedy. Under these circumstances, we decline to address the existence, *vel non*, or the significance of any insubordination.

In holding to the contrary,[6] the district court relied principally on two cases, *Augustus v. School Bd. of Escambia County, Fla.*, 507 F.2d 152, 155 (5th Cir. 1975), and *Melton v. Young*, 465 F.2d 1332, 1334 (6th Cir. 1972), which, in the words of the court below, had "affirmed district court findings that the display of a Confederate flag was a focal point of racial irritation, offensive to a racial minority, and contributed to violence and the disruption of the school." *Denno v. School Bd. of Volusia County*, 959 F.Supp. 1481, 1487 (M.D. Fla. 1997). However, in both *Augustus* and *Melton*, integration was in its early stages and the records before the courts revealed many substantial racial disturbances; indeed, each school had to be closed on more than one occasion to avoid racial violence. *See Augustus*, 507 F.2d at 155; *Melton*, 465 F.2d at 1333. In short, both cases fell within the *Tinker* ruling that school officials could prohibit the display of a symbol in circumstances that warrant a reasonable fear on the part of school officials that the display would substantially disrupt discipline in the school.

In stark contrast to *Augustus* and *Melton*, the facts that we must assume in the present posture of the instant case place it clearly within the actual *Tinker* holding recognizing a student's First Amendment right

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[6] In finding that Denno had alleged no clearly established right to display the Confederate flag at school, the district court expressly noted that a heightened pleading standard applies to § 1983 actions filed against officers in their individual capacities. *Denno*, 959 F.Supp. at 1484. Denno challenges that application on appeal, arguing that such a raising of the bar is incompatible with Fed. R. Civ. P. 8(a). However, because we conclude that Denno's complaint is adequate under either standard, we need not resolve this challenge.

to display a symbol. This case comes to us in a Rule 12(b)(6) posture where we take the allegations of the plaintiff as true. Thus, we must accept as true Denno's allegation that the context was a small group discussion, involving no disruption either actual or likely, and similarly accept the allegation that there had been no disruption attributable to similar occurrences. We must also take as true Denno's assertions that there had been no history of racial tension or disorder at Pine Ridge High School. Assuming these facts, and noting the absence of any facts in the complaint that would suggest a reasonable fear of disruption, we conclude that Denno has alleged a violation of the very First Amendment right that *Tinker* clearly established. The instant case involves facts materially similar to those in *Tinker*, and *Tinker* "truly compels" the conclusion that Denno's federal right was violated.[7] *Santamorena*, 147

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[7] For the right to be clearly established, the law of this circuit is clear that there need not be an identical prior case; rather, what is necessary is a prior case that is materially similar. *See Lassiter v. Alabama A& M Univ.*, 28 F.3d 1146, 1150 (11th Cir. 1994) (en banc) ("The facts need not be the same as the facts of the immediate case. But they do need to be materially similar.")(quoting from and adopting *Adams v. St. Lucie County Sheriff's Dep't.*, 962 F.2d 1563 (11th Cir. 1992)(Edmondson, J., dissenting)). With the holding in *Tinker* as clearly established law, and the reasonableness of the perceived likelihood of disruption test as the touchstone, we conclude that the facts in the instant case are materially similar to those in *Tinker*. Indeed, in light of the antiseptic factual circumstances that we must accept as true at the motion to dismiss stage in the instant case, the likelihood of disruption as alleged by the complaint is clearly less than that which was present in *Tinker*. In other words, the facts as revealed in the opinions of Supreme Court in *Tinker* clearly constitute a greater perceived risk of disruption than the facts alleged in the instant complaint. Therefore, the result we reach in the instant appeal follows *a*

F.3d at 1340 (citing and quoting *Ensley v. Soper*, 142 F.3d 1402, 1406 (11th Cir. 1998), and *Lassister v. Alabama A&M Univ.*, 28 F.3d 1146, 1150 (11th Cir. 1994) (en banc)). Accordingly, we reverse the district court's Rule 12(b)(6) dismissal of Denno's § 1983 claim against the individual defendants.[8]

II. LIABILITY OF THE BOARD

Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018 (1978), holds that local governments (and branches thereof)[9] may not be held liable for constitutional deprivations on the theory of *respondeat superior*. Rather, they may be held liable only if such constitutional torts result from an official government policy, the actions of an official fairly deemed to represent government policy, or a custom or practice so pervasive and well-settled that it assumes the force of

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fortiori from *Tinker*, or in other words, is dictated or compelled by it.

[8] Given the Rule 12(b)(6) posture of the instant case, we of course have not considered any evidence in the summary judgment record developed with respect to the claim against the Board, discussed *infra*. We do recognize, however, that further development of the record at later stages of this litigation may well reveal facts that point in the direction of a reasonable fear of disruption, and may well change the factual context such that the challenged actions of the individual Defendants would not violate clearly established law.

[9] School boards constitute branches of local government and thus may be subject to liability under *Monell*. *See Arnold v. Board of Escambia County*, 880 F.2d 305, 310 (11th Cir. 1989).

law. *Id.* at 694, 98 S.Ct. at 2037-38; *Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 489 (11th Cir. 1997); *Church v. City of Huntsville*, 30 F.3d 1332, 1343 (11th Cir. 1994). In order for the actions of a government official to be deemed representative of the municipality, the acting official must be imbued with final policymaking authority. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481, 106 S.Ct. 1292, 1299 (1986). Unlike the qualified immunity issue discussed above, the district court permitted the § 1983 claims against the Board to proceed beyond the pleadings stage; however, the district court granted summary judgment in favor of the Board.

Because Denno does not argue that the Board maintained any official policy prohibiting Confederate symbols, our resolution of this claim hinges on two issues: 1) whether the Pine Ridge High School administrators were officials vested with final policymaking authority, and 2) whether a custom or practice banning Confederate symbols existed. The district court answered both queries in the negative and accordingly granted summary judgment in favor of the Board. We agree with that assessment for the following reasons.

A. Final Policymaking Authority

Scala v. City of Winter Park, 116 F.3d 1396 (11th Cir. 1997), serves as our compass in the area of determining whether officials act with final policymaking authority so as to trigger entity liability under *Monell*. In *Scala*, drawing on *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915 (1988)(plurality opinion), we squarely held that "[f]inal policymaking authority over a

particular subject area does not vest in an official whose decisions in the area are subject to meaningful administrative review." *Scala*, 116 F.3d at 1401. With this "embedded" principle in mind, *id.*, we find Denno's argument that the school administrators possessed final policymaking authority unpersuasive.

Policy 208 of the Volusia County School Board, entitled "Code of Student Conduct and Discipline," sets forth a successive three-step grievance procedure for the resolution of "complaints filed by a student or parent/guardian with regard to their respective rights under school board policy, school rule, state or federal law." Step 1 involves meeting with the school principal informally; Step 2 involves review by the area assistant superintendent; and Step 3 permits a student to request a hearing if dissatisfied with the previous two steps. Policy 208 at 14-15. In order to trigger review by the area assistant superintendent, the grievant is required to file a copy of the grievance form with the area assistant superintendent within 7 days of the meeting with the principal outlined in Step 1. Policy 208 at 14.

The district court concluded that Policy 208, the "Code of Student Conduct and Discipline," provided for meaningful review of the school officials' disciplinary decisions, but concluded that Denno did not timely comply with the requirements for seeking review under Step 2. The court relied on Policy 208 itself and on a letter dated April 22, 1996, from Area Assistant Superintendent Lee Britton, stating that Denno had failed to pursue the appeal of his suspension in timely fashion and had therefore waived the opportunity to request the hearing mentioned in Step 3 of the grievance procedure. Indeed, it appears

that Denno did not pursue an appeal in timely fashion and never filed a copy of the grievance form necessary to proceed with Step 2 of the review procedure.

As a matter of law, we agree with the district court that the "Code of Student Conduct and Discipline" allowed for meaningful review of Denno's suspension. The fact that Denno had to file an appeal with the area assistant superintendent before his suspension could be reviewed does not make the school administrators final policymakers. *Scala* clearly states that this circuit equates meaningful review with the opportunity for meaningful review. *Scala*, 116 F.3d at 1402. ("It is clear that [officials] do not become policymakers for § 1983 purposes simply because persons who disagree with their decisions have to file an appeal in order to have those decisions reviewed.") In other words, automatic review need not be made available when the opportunity for meaningful review is present. The express review mechanisms set into place by the grievance procedures detailed in the "Code of Student Conduct and Discipline" satisfy us that such opportunity existed in the instant case. Therefore, given the availability of this review, we agree with the district court that the Pine Ridge High School administrators were not final policymakers so as to make the Board liable under *Monell*.

B. Custom or Practice

In order for the Board to be held liable under the custom or practice prong of *Monell*, Denno must

demonstrate that a custom or practice of banning the Confederate flag at high schools within the school district is so well-settled and pervasive that it assumes the force of law. *See Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 489 (11th Cir. 1997). Put another way, Denno must show a "persistent and widespread practice" of prohibiting the Confederate emblem about which the Board knew or of which practice it had constructive knowledge, because "[n]ormally random acts or isolated incidents are insufficient to establish a custom . . . ." *Church v. City of Huntsville*, 30 F.3d 1332, 1345 (11th Cir. 1994)(quoting *Depew v. City of St. Marys*, 787 F.2d 1496, 1499 (11th Cir. 1986)).

The district court held that a custom of prohibiting the Confederate flag from being displayed on school grounds could not be attributed to the Board. While Denno correctly points out that three other students were disciplined for similar displays of the flag in December 1995, these incidents transpired in the immediate aftermath of Denno's suspension in an effort to maintain discipline amongst the students and did not represent a persistent and widespread practice of the Board.[10] Indeed, Wayne Denno's own testimony

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[10] Apparently, after Denno was suspended, the Dennos relayed the information to the local press. Pine Ridge Principal Sandra Rowe learned of the story covering Denno's suspension, and according to Denno, issued an unwritten ban of the Confederate flag to the faculty in a meeting held on December 15, 1995. The three other students who were disciplined after Denno for displaying the Confederate flag were disciplined subsequent to the December 15th meeting. However, for the reasons discussed above, the Principal was not a final policymaker, and for the reasons discussed in the text, there is no evidence that the unwritten ban

undermines his argument that there was a custom or practice of banning the flag. Denno stated in his deposition that he had previously displayed the Confederate flag on school grounds and had not been disciplined and had witnessed others do so without consequence. In fact, Denno could not recall any student, prior to his suspension, suffering punishment for the display of the Confederate flag at Pine Ridge High School. Nor did Denno adduce evidence of similar suspensions at other schools within the school district governed by the Board. Given the lack of evidence with respect to the prohibition of the Confederate flag at Pine Ridge or at other schools within the district, we agree with the district court that Denno failed to adduce evidence creating a genuine issue of fact as to a pervasive and well-settled custom of banning the Confederate flag so as to make the Board potentially liable under *Monell*.

For the foregoing reasons, we agree with the district court that, under *Monell* and its progeny, the Board cannot be held liable. Thus, we affirm the district court's grant of summary judgment in favor of the Board.

III. CONCLUSION

We affirm the district court's grant of summary judgment in favor of the Board; however, we reverse the court's Rule 12(b)(6) dismissal of Denno's § 1983

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was sufficiently pervasive or well-settled to have put the Board on notice.

claims against the individual defendants and remand for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

BLACK, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority's well-reasoned decision as to the School Board, as set forth in Part II of the opinion. I disagree, however, with the majority's decision as to the qualified immunity of the school officials.

The school officials begin with qualified immunity. To overcome this immunity, Appellant has the burden of pointing to pre-existing case law that involves materially similar facts and truly compels the conclusion that the school officials violated his First Amendment rights. Whether the complaint alleges the violation of a clearly established right is a question of law subject to de novo review.

A school official does not violate a student's First Amendment rights by restricting the student's conduct, so long as the official reasonably believes the student's conduct might lead to material disruption. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 513-14, 89 S. Ct. 733, 740 (1969). Neither party has cited, nor could I find, any case clearly establishing the unreasonableness of a school official's belief that the display of a Confederate battle flag in a racially integrated school in the deep South might lead to material disruption. In the absence of such a case, the school officials are entitled to immunity. Accordingly, I respectfully dissent from Part I of the opinion.

UNITED STATES DISTRCIT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

LINDA DENNO, as parent, legal guardian and next friend for WAYNE DENNO,

Plaintiff,

v. Case No. 96-673-CIV-ORL-22B

SCHOOL BOARD OF VOLUSIA COUNTY, DENNIS ROBERTS, in his official capacity, and ROBERT WALLACE, in his official capacity,

Defendants

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ORDER

This cause comes before the Court for consideration of Defendants' Motion for Summary Judgment (Doc. 19) and Plaintiff's Opposition (Doc. 56). Plaintiff Linda Denno seeks to recover on behalf of her son, Wayne Denno, pursuant to 42 U.S.C. S 1983 for the alleged deprivation of Wayne Denno's ("Denno") First, Fifth, and Fourteenth Amendment rights arising from the school's discipline of Denno for displaying a confederate flag.

I. Standard for Summary Judgment

Summary judgment is appropriate only when the Court is satisfied ,that there is no genuine issue as to

any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In making this determination, the Court must view all of the evidence in a light most favorable to the non-moving party. *Samples on Behalf of Samples V.* Atlanta, 846 F.2d 1328, 1330 (11th Cir. 1988). The moving party has the initial burden of establishing the absence of a genuine issue of fact. *Celotex Corp. v. Catrett:*, 477 U.S. 317 (1986). Next, the "non-moving party . . . bears the burden of coming forward with sufficient evidence of every element that he or she must prove., *Rollins v. Techsouth, Inc.*, 833 F.2d 1525, 1528 (11th Cir. 1987). To that end, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file', designate 'specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324.

II. Background Facts

Denno was a student at Pine Ridge High School in Volusia County, Florida, in December 1995. On December 13, 1995, he displayed a four-inch by four-inch Confederate battle flag to his friends during the school lunch period. A school administrator approached the group and instructed Denno to put away the flag and demanded that the other students remove their items bearing Confederate symbols. When Denno attempted to explain why he was displaying the Confederate flag, the administrator ordered Denno to accompany him to the Student Resource Center. Denno claims that while he was being transported to the Student Resource Center, the administrator repeatedly told him to "shut up" when he

attempted to explain that he was displaying the flag because of its historical significance as a symbol of southern heritage. Denno states that the administrator told him that he considered the flag to be a racist symbol and that Denno did not have the First Amendment right to wear or display the Confederate flag on school grounds. Deposition of Wayne Denno (Doc. 25) at 49-50.

Denno was sent home that day and returned the next morning so that his suspension could be processed. While waiting, Denno states that another student was detained for wearing a shirt with a Confederate flag on it. The school administrator ordered this student to remove his shirt or turn it inside out. Denno urged the student not to comply. The administrator accused Denno of being disruptive and interfering with the discipline of another student. Defendants Roberts and Wallace suspended Denno for nine days with a recommendation for expulsion for the following reasons: "attempting to incite a riot by parading the Confederate flag during lunch period/became in-subordinate to administrator and disruptive in student resource center by continuing to incite student ..."

Denno's suspension generated press reports. Plaintiff contends that the school principal instituted an unwritten ban on Confederate flags or other symbols of Southern heritage in a meeting on December 15, 1995, as a result of the newspaper articles. During this meeting, Plaintiff claims that the principal instructed that any student displaying or wearing a Confederate flag was to be suspended. After Denno's suspension,

the newspaper reported that at least three other students were suspended for wearing or displaying the Confederate flag. Plaintiff's opposition (Doc. 56), Exhibit B.

One week after Denno's suspension, Defendants filed a criminal complaint against him, alleging that he disturbed a school function in violation of § 871.01, Fla. Stat. Plaintiff filed the instant suit in this Court on July 15, 1995, seeking to recover compensatory and punitive damages for the alleged violation of Denno's rights to free speech, peaceful assembly, due process and equal protection under 42 U.S.C. § 1983. Plaintiff also sought to recover for the Defendants' alleged malicious prosecution of Denno in filing the criminal complaint against him. By order dated February 3, 1996, this Court dismissed Plaintiff's § 1983 claims against Defendants Roberts and Wallace in their individual capacities, declined to exercise jurisdiction over Plaintiff's state tort claim of malicious prosecution, and struck Plaintiff's claim for punitive damages. Therefore, remaining is a § 1983 action against the Volusia County School Board ("School Board") and Roberts and Wallace in their official capacities.

III. Analysis

Municipalities may not be held liable under 42 U.S.C. § 1983 on a theory of respondeat superior. Monell *v. Department of Social Services*, 436 U.S. 658, 691 (1978). Rather, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983."

Id. at 694. Therefore, a municipality or local governmental body may be held liable under § 1983 for a constitutional violation caused by either: (1) an action taken or policy made by an official with final policymaking authority; or (2) a custom or policy of the local governmental body. *Church v. City of Huntsville,* 30 F.3d 1332, 1343 (11th Cir. 1994). For the purposes of this Motion for Summary Judgment, Defendants do not dispute that Denno was deprived of a constitutional right,[1] but argue only that Plaintiff cannot meet the burden of establishing that the alleged constitutional violation resulted from the implementation of a policy, a decision by an official with final policymaking authority, or a custom or practice. Plaintiff does not dispute Defendants' contention that the School Board did not implement a formal policy banning student display of Confederate symbols. Therefore, the issues that remain are whether there was a decision by an official with final policymaking authority or a custom or practice.

A. ***Final Policymaking Authority***

In their Motion for Summary Judgment, Defendants address the issue of whether the principal of the school has final policymaking authority. Defendants argue that because the principal's decisions must conform to the policies of the School Board and because all

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[1] In their Motion for Summary Judgment, Defendants do not address whether Denno's constitutional rights were violated. The Court questions the validity of these claims. However, because summary judgment is otherwise due to be granted, the Court will not address these issues.

decisions are subject to review, the principal does not possess final policymaking authority.

The Supreme Court has discussed the issue of which municipal officials may hold a municipality liable under § 1983. In *Penibaur v. City of Cincinnati,* 475 U.S. 469, 480 (1986), the Court concluded that municipal liability may attach to a single decision made by a municipal official if that official is the final policymaker for the municipality. Later, in *City of St. Louis v. Praprotnik, 485* U.S. 112, 129-130 (1988), a plurality of the Court held that "appointing authorities' who have authority to initiate Personnel decisions are not municipal policymakers if those decisions are subject to meaningful administrative review.

In light of *Pembaur and* Praprot:nik, the Eleventh Circuit "has interpreted Monell's policy or custom requirement to preclude § 1983 municipal liability for a subordinate official's decisions when the final policymaker delegates decisionmaking discretion to the subordinate, **but** retains the power to review the exercise of that discretion." Scala *v.* City of Winter Park, 116 F.3d 1396, 1399 (11th Cir. 1997) (citing *Mandel v. Doe, 888* F.2d 783, 792 (11th Cir. 1989)). The Eleventh Circuit has also explained in *Morro v. City of Birmingham,* 117 F.3d 508, 514 (11th Cir. 1997), *cert. denied,* 118 S. Ct. 1299 (1998), that it has:

> consistently recognized and given effect to the principle that a municipal official does not have final policymaking authority over a particular subject matter when that official's decisions are subject to meaningful administrative review.

> See *Scala v. City of Winter Park*, 116 F.3d 1396, 1398-99 (11th Cir. 1997) (holding that city manager was not a final policymaker with respect to employment termination decisions at municipal fire department where those decisions were reviewable by the city civil service board); *Manor Healthcare Corp. v. Lomelo*, 929 F.2d 633, 638 (11th Cir. 1991) (holding that a mayor was not a final policymaker with respect to zoning decisions where the city charter provided that the city counsel could override the mayor's veto of zoning ordinances); Mandel *v. Doe*, 888 F.2d 783, 792-94 (11th Cir. 1989) (recognizing that a municipal officer has final policymaking authority when his decisions "are not subject to review- and holding that discretionary review initiated by the municipal official himself does not prevent the official from being a final policymaker); *cf. Hill v. Clifton*, 74 F.3d 1150, 1152 (11th Cir. 1996) (accepting concession that city police chief was not final policymaker with respect to employment decisions where police chief's decisions could be reversed by the city manager); *Martinez v. City of opa-Locka*, 971 F.2d 708, 713-15 (11th Cir. 1992) (finding final policymaking authority where 'the City Manager's decision to hire or fire administrative personnel is completely insulated from review").

Morro, 117 F.3d at 514.

In the instant case, the Court must determine whether the school principal, who adopted a rule prohibiting student display of Confederate symbols,[2] possesses final policymaking authority in the area of student discipline and speech. In making this determination, "the court should examine not only the relevant positive law, including ordinances, rules and regulations, but also the relevant customs and practices having the force of law." *Mandel v. Doe*, 888 F.2d at 793.

Defendants argue that relevant state law and School Board policy establish that the School Board rather than the principal at Pine Ridge had final policymaking authority in the area of student speech and discipline. For support, Defendants cite to relevant state statutes and School Board policies.

Section 4(b) of Article IX of the Constitution of the State of Florida provides that "[t]he school board shall operate, control and supervise all free public schools within the school district ...." Section 230.22, Fla. Stat., mandates that school boards shall adopt necessary programs and policies for the efficient operation and improvement of the district school system. Further, § 230.23, Fla. Stat., enumerates the powers and duties of the school boards with respect to adopting policy in the areas of student speech and discipline. That statute provides in pertinent part:

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[2] For purposes of this motion for Summary Judgment, Defendants do not dispute Plaintiff's assertion that the principal made a decision to prohibit the display of Confederate symbols prior to Denno's suspension.

> The school board, acting as a board, shall exercise all powers and perform all duties listed below:
>
> *(6)(c) Control of pupils.--*
>
> 1. Adopt rules and regulations for the control, discipline, in-school suspension, suspension, and expulsion of pupils and decide all cases recommended for expulsion....
>
> (6)(d) *Code of student conduct.*--Adopt a code of student conduct for elementary schools and a code of conduct for secondary schools .... Each code shall be based on the rules governing student conduct and discipline adopted by the school board . . . . Each code shall include, but not be limited to: 1. Consistent policies and specific grounds for disciplinary action . . . (and] 3. An explanation of the responsibilities and rights of students with regard to . . . free speech and student publications, assembly, privacy, and participation in school programs and activities.

230.23(6)(c) and (d), Fla. Stat.

Thus, statutory law vests the state school board with overall policymaking authority. The authority over conduct and discipline of the public schools is then delegated primarily to the county school boards. *See Sweet v. Childs,* 507 F.2d 675, 680 (5th Cir. 1975) ("the Florida Supreme Court has viewed the area of student 'conduct and discipline' as 'vested primarily in the county boards,"). For the Volusia County School District, the Volusia County School Board is responsible

for making policy decisions in the area of student conduct and discipline.

In performing its duties, the School Board adopted the Code of Student Conduct and Discipline ("Code"). Doc. 23, Exhibit F. In that Code, the School Board addresses student speech and discipline. In particular, the Code provides that lifsltudents are entitled to freedom of expression of their views unless there are legal reasons to regulate their speech or publications.' *Id.* The School Board also explains that '[s]tudents have the responsibility to refrain from the distribution or display of material which could cause conduct that would interfere with discipline or cause disorder.' Id. The Code continues to define the levels of offenses and the appropriate disciplinary procedures. Id.

The School Board Code and Florida law provide a great amount of discretion to principals, but limit the principals, authority to the rules of the state and local school boards. For example, § 232.26(i)(a), Fla. Stat., provides that the principal shall develop policies for delegating to teachers or other members of the instructional staff the responsibility for the control and direction of students subject to the rules of the state board and school board. Similarly, § 232.26(b), Fla. Stat., provides that the principal may suspend a student in accordance with the rules of the district school board. In addition, the School Board Code gives the principal the authority to develop rules appropriate for the school in accordance with School Board Code. Doc. 23, Exhibit G. The Code specifically provides that "[elach school is authorized to attach local school rules to the Code of Student Conduct and Discipline as long as such

rules and regulations do not conflict with this Code.' Doc. 23, Exhibit F. According to Florida statutory provisions as well as the School Board Code, it is clear that the authority of the principal is constrained by the School Board's policies and rules.

The School Board's Code also provides for a student grievance procedure where a student or parent may have the principal's decisions or policies reviewed. The Code states that the purpose of the procedure "is to resolve any complaints filed by a student or parent/guardian with regard to their respective rights under school board policy, school rule, state or federal law." Doc. 23, Exhibit F. The code explains that the student shall first meet with the school principal in order to settle the matter informally. If the matter is not settled, a grievance may be filed with the area assistant superintendent responsible for the school. Upon receipt of the superintendent's decision, the student may request an informal hearing before the superintendent's designee.

In the instant case, the Court finds that the principal's decisions in the area of student discipline and speech are not the policies of the School Board, and, therefore, the principal is not the final municipal policymaking authority. Not only are the principal's decisions constrained by the policies of the School Board, the decisions are also subject to review by the policymakers. Through the Code's grievance procedure, Defendants have the authority to keep the principal's conduct in conformance with their policies.

In response, Plaintiff argues that the School Board confers policymaking power upon individual school principals. For support, Plaintiff cites to the school rules, which provide in pertinent part:

> Discipline
>
> ALL TEACHERS have been requested to be on the alert for any student behavior which is in violation of school regulations. Students should behave in a manner that will be a credit to our school. A teacher's authority is not restricted to his/her classroom. It also includes the building and grounds, and any school-sponsored activity. **All** teachers and staff members have the authority to counsel and to refer students for behavior considered in opposition to established school policy.
>
> Dress Code
>
> Dress must be safe and appropriate to the specific curricular and extracurricular activity. Pine Ridge High School is climate controlled with an average temperature of 78 (degrees), therefore students should wear clothing appropriate for that temperature. Students must also wear safe footwear. If a student wears inappropriate clothing, the teacher will notify the office so the student can arrange for a change of clothes. Indicators of inappropriate dress include but are not limited to the following: bare midriffs on males or females, shorts of inappropriate length, strapless clothing, sleepwear, beach/swimwear, see-

> through clothing, sleeveless undershirts, etc. Also, curlers, rollers, sunglasses, bandanas, or suggestive, profane or drug related advertisement on clothing of any type are not appropriate.

Doc. 56, Exhibit C.

As a result of these school rules, Plaintiff asserts that individual administrators are given virtually unbridled authority in determining whether a particular dress or display of symbols is appropriate. The Court disagrees. As the Eleventh Circuit explained in Mandel,

> [T]he mere delegation of authority to a subordinate to exercise discretion is not sufficient to give the subordinate policymaking authority. Rather, the delegation must be such that the subordinate's discretionary decisions are not constrained by official policies and are not subject to review.

Mandel, 888 F.2d at 792. Here, the School Board's Code specifically states that the principal must conform to all school board policies and procedures. See Doc. 23, Exhibit G. In addition, Florida law mandates that the principal develop policies only in accordance with the rules of the district school board.

Further, as explained supra, any policy or decision made by the principal is subject to review. Plaintiff contends that the review is not meaningful because Denno's grievance was rejected without explanation or opportunity to confront accusers or present evidence.

However, the evidence suggests that Denno's request for review was denied because the request to the area assistant superintendent was not made within the applicable time limits set forth in the School Board's Code. See Doc. 56, Exhibit J. Denno's failure to seek timely review did not make the review process meaningless. Review of a decision does not have to be automatic in order to be meaningful. *See Scala, 116* F.3d at 1402 ("it is clear that [municipal officials] do not become final policymakers for § 1983 purposes simply because persons who disagree with their decisions have to file an appeal in order to have those decisions reviewed"). Accordingly, the Court finds that the review available to a student or parent as set forth in the Code is meaningful.

Because the school principal could develop school rules only within the constraints of the School Board Code and because all decisions made by the principal are subject to administrative review, the Court concludes that the principal is not the final policymaking authority. Therefore, the School Board cannot be held liable for the principal's actions under this theory.

B. Custom or Practice

Municipal liability pursuant to § 1983 may also be based on "a practice or custom that is so pervasive as to be the functional equivalent of a policy adopted by the final policymaker." Church, 30 F.3d at 1343. To establish a practice or custom:

> it is generally necessary to show a persistent and widespread practice. Moreover, actual or constructive knowledge of such customs must be attributed to the governing body of the municipality. Normally random acts or isolated incidents are insufficient to establish a custom or policy.

Id. at 1345 (quoting *Depew v. City Of St. Marys*, 787 F.2d 1496, 1499 (11th Cir. 1986)). Furthermore, a plaintiff must show a widespread practice that, "although not authorized by written law express municipal policy, is so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Brown v. City of Fort* Lauderdale, 923 F.2d 1474, 1481 (11th Cir. 1991) (citing *Praprotnik*, 485 U.S. at 127).

In their Motion for Summary Judgment, Defendants argue that Plaintiff is unable to present evidence of a longstanding or widespread prohibition against student display of Confederate symbols. Plaintiff responds that "other students were intially [sic] approach (sic] in the Pine Ridge High School courtyard on December 13, 1995, and ordered to remove, cover-up or put away Confederate battle flags and symbols." Doc. 56, at 14. Plaintiff also presents evidence that another student was asked to remove his T-shirt bearing a Confederate battle flag on December 14, 1995. Lastly, Plaintiff submits newspaper articles[3] describing

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[3] The only evidence Plaintiff submits as to the students suspended on December 15, 1995, are newspaper articles. Newspaper articles are inadmissible hearsay. However, because summary judgment is due to be granted on this issue, the Court will consider the evidence.

the suspension of at least three other students on December 15, 1995, for wearing or displaying Confederate battle flags. Doc. 56, Exhibits B, K, and L.

The Court finds that these isolated incidents do not establish a permanent or well-settled custom or practice. The events presented by Plaintiff were not numerous and occurred immediately after Denno was reprimanded in order to maintain the safety of the students. In addition, there is no evidence in the record that any other students were disciplined in the aftermath of Denno's suspension, nor is there any evidence of students who were disciplined prior to Denno's suspension. In fact, prior to Denno's suspension, Denno as well as other students wore and displayed Confederate symbols and were never disciplined. Further, Plaintiff neither submitted any evidence nor addressed the issue in his response relating to whether the School Board had actual or constructive knowledge of the principal's decision to prohibit the display of Confederate symbols. Therefore, Plaintiff has not met the burden of establishing that the School Board had a persistent and widespread custom or practice. Accordingly, summary judgment is due to be granted in favor of Defendants.

IV. Conclusion

Based on the foregoing, it is ORDERED as follows:

1. Defendant's Motion for Summary Judgment (Doc. 19), filed December 29, 1997, is GRANTED.

2. This case is removed from Judge Conway's May 1998 trial docket.

3. The clerk shall enter final judgment for the Defendants providing that Plaintiff shall take nothing on his claims against Defendants and that Defendants shall recover costs.

4. The clerk shall close this case.

5. All pending motions are DENIED as MOOT.

DONE AND ORDERED in Chambers, Orlando, Florida, this 29th day of April, 1998.

/s/
ANNE C. CONWAY
United States District Judge

Copies to: Counsel of Record
Unrepresented Parties
Administrative Law Clerk
Courtroom Deputy

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

LINDA DENNO, as parent, legal guardian and next friend for WAYNE DENNO,

Plaintiff,

v. Case No. 96-763-CIV-ORL-22.

SCHOOL BOARD OF VOLUSIA COUNTY, DENNIS ROBERTS, an individual and ROBERT WALLACE, an individual,

Defendants.
_____/

ORDER

CONWAY, District Judge.

This cause comes before the Court on the Defendants' Motions to Dismiss (Doc. 4, 6, 7) and Plaintiff's Opposition to the Motion (Doc. 9). Plaintiff Linda Denno seeks to recover on behalf of her teen-aged son, Wayne Denno, for alleged violations of Wayne's civil rights[1] arising from the school's discipline of Wayne for displaying a Confederate flag.

[1] Plaintiff also asserts a supplemental state tort claim for malicious prosecution in Count II.

Defendants, the school board and school officials, seek dismissal of the claims against them. Plaintiff has withdrawn the claim for conspiracy in violation of Wayne's civil rights, under 42 U.S.C. § 1985. Therefore, the Court will only address the Motions to Dismiss as they relate to 42 U.S.C. § 1983, malicious prosecution, and punitive damages.

Standard for Motion to Dismiss

The accepted rule is that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). A trial court, in ruling on a motion to dismiss, is required to view the complaint in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). The material allegations of the complaint are taken as true for the purpose of deciding a motion to dismiss. St. Joseph's Hospital v. Hospital Corp. of America, 795 F.2d 948 (11th Cir.1986).

Background facts

The applicable facts, set forth in the light most favorable to the Plaintiff are as follows:

Wayne Denno was a student at Pine Ridge High School in Volusia County in December 1995 when he was suspended for nine school days for displaying a four- inch by four-inch Confederate battle flag during the school lunch period. Wayne was displaying the flag

to his friends in the high school courtyard on December 13, 1995, when a school administrator approached Wayne and demanded that he put the Confederate flag away. The administrator also demanded that other students wearing apparel bearing Confederate symbols remove the items. When Wayne attempted to explain why he was displaying the Confederate flag, the administrator ordered Wayne to accompany him to the high school student resource center for disciplinary action. On the way to the resource center, the administrator repeatedly told Wayne to "shut up" when he attempted to explain that he was displaying the Confederate flag because of its historical significance as a symbol of Southern heritage. The administrator told Wayne that he considered the flag to be a racist symbol and that Wayne did not have the First Amendment right to wear or display the Confederate flag on school grounds.

While at the student resource center, another student was detained for wearing a T-shirt with a Confederate flag on it When school administrators demanded that the student remove his shirt or turn it inside out, Wayne urged the student to "adhere to his principles." Wayne was suspended by Defendants Roberts and Wallace for nine school days for the following reasons: "attempting to incite a riot by parading the Confederate flag during lunch period/became insubordinate to administrator and disruptive in student resource center by continuing to incite student ..." Defendants recommended the expulsion of Wayne. Subsequent to Wayne's suspension, the media reported the events at Pine Ridge High School. A demonstration by the Ku Klux

Klan followed.

One week after Wayne's suspension, Defendants filed a criminal complaint against Wayne, alleging that he disturbed a school function in violation of Fla. Stat. § 871.01. Plaintiff filed the instant suit in this Court on July 15, 1996, seeking to recover compensatory and punitive damages for the alleged violation of Wayne's rights to free speech, peaceful assembly, due process and equal protection under 42 U.S.C. § 1983. Plaintiff also seeks to recover for the Defendants' alleged malicious prosecution of Wayne in filing the criminal complaint against him.

Motions to Dismiss

A. § 1983 claims against the School Board and the administrators in their official capacity

Count I of the Complaint asserts that the Defendants violated 42 U.S.C. § 1983 in depriving Wayne of his First, Fifth, and Fourteenth Amendment rights by disciplining him for displaying a Confederate flag. Over the last twenty years, the Supreme Court has defined the First Amendment protections available to public school students via three cases. Compare *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 504-06, 89 S.Ct. 733, 735-36, 21 L.Ed.2d 731 (1969) (school could not prohibit students from wearing black arm bands to protest Viet Nam war) with Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685, 106 S.Ct. 3159, 3165, 92 L.Ed.2d 549 (1986) (school could sanction student for lewd and indecent speech at school assembly) and *Hazelwood Sch.*

Dist. v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (school could censor content of school newspaper). In these cases, the Supreme Court has struck a delicate balance between recognition of students' constitutional rights to freedom of speech or expression and deference to school officials' duty to enforce discipline.

In *Tinker*, the Supreme Court upheld the students' right to wear black arm bands in protest against the war in Viet Nam, holding that unless the prohibited conduct would " 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' " the prohibition would violate the First Amendment. *Tinker*, 393 U.S. at 509, 89 S.Ct. at 738. In contrast, in *Hazelwood*, the Court upheld a school's decision to censor the content of a school-sponsored newspaper. 484 U.S. at 273, 108 S.Ct. at 571. The Court held that schools may control "the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* While students still enjoy First Amendment rights, these rights are curtailed somewhat by the Supreme Court's deference to school administrators' judgments as to what speech is appropriate in the public school context.

Under Eleventh Circuit precedent, a municipality or local governmental body may be held liable under § 1983 for a constitutional violation caused by: (1) a custom or policy of the local governmental body; or (2) an action taken or policy made by an official with final policy-making authority. *Church v. City of Huntsville*, 30

F.3d 1332, 1343 (11th Cir.1994). In the instant case, Plaintiff acknowledges that municipal liability will not attach under the doctrine of *respondeat superior* and is not attempting to state a claim under such a theory.

The Defendants seek dismissal of the § 1983 claims against them, arguing that the Complaint fails to specifically allege that the existence or enforcement of a school board custom or policy which deprived Wayne of a federal right. The Defendants contend that the allegations against the School Board and against Roberts and Wallace in their official capacities fail to meet a heightened pleading requirement.

The Court rejects the Defendants' argument that a heightened pleading requirement exists for § 1983 allegations against local governments (or individuals in their official capacity). A Supreme Court case directly on point, *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), expressly held just the opposite--that a federal court may not apply a "heightened pleading standard" to § 1983 claims alleging local government liability. As the Supreme Court explained, "[F]ederal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." Given the existence of a three-year old Supreme Court opinion directly on point, the Defendants' reliance on *Arnold v. Board of Education of Escambia County, Ala.*, 880 F.2d 305, 310 (11th Cir.1989) is misplaced.

Defendants argue that Plaintiff has alleged only a

single incident of wrongful conduct, which is insufficient to establish the existence of a custom or policy. In response, Plaintiff contends that the Complaint sufficiently alleges an unconstitutional custom or policy in the form of an "unwritten ban" on Confederate flags and symbols (Doc. 1 ¶¶ 19, 20, 23). The Complaint also alleges that Wayne and four other students at Pine Ridge High School were suspended for violating this "unwritten ban" on Confederate symbols (¶¶ 22 & 23).

In light of the holding in *Tinker v. Des Moines Independent School District*, this Court finds that the Plaintiff has adequately pled allegations of a governmental custom or policy, i.e., an "unwritten" ban on Confederate symbols, leading to the deprivation of Wayne's First Amendment rights. *See Tinker*, 393 U.S. at 504-06, 89 S.Ct. at 735-36 (school's prohibition on black arm bands worn to protest Viet Nam war violated students' First Amendments rights).

B. § 1983 claims against individual administrators, Roberts and Wallace.

As discussed *supra*, a heightened pleading requirement does not apply to § 1983 claims made against local government officials in their official capacity, under *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). However, the Court notes that the holding in *Leatherman* does not control the issue of heightened pleading for allegations against government officials in their individual capacities. In *Leatherman*, the Supreme Court expressly refrained

from deciding whether "qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." 507 U.S. at 167, 113 S.Ct. at 1162; see also Arrington v. Dickerson, 915 F.Supp. 1503, 1513 (M.D.Ala.1995) (holding that *Leatherman* does not offer much guidance to § 1983 qualified immunity cases); *Malone v. Chambers County Bd. of Comm'rs.*, 875 F.Supp. 773, 790 (M.D.Ala.1994) (finding that the holding in *Leatherman* did not repeal the heightened pleading standard in § 1983 actions where a defendant official is entitled to assert the defense of qualified immunity). The Supreme Court reasoned that "unlike various government officials, municipalities do not enjoy immunity from suit--either absolute or qualified--under § 1983." *Leatherman*, 507 U.S. at 166, 113 S.Ct. at 1162.

Because the Supreme Court has not established binding precedent on the issue, this Court is bound by the previous holdings of the Eleventh Circuit. Thus, the Court agrees with the reasoning applied by other district courts in the Eleventh Circuit faced with the same issue:

> *Leatherman* calls into question the validity of imposing a heightened pleading standard in any § 1983 case. However, absent further direction from the Supreme Court or the Eleventh Circuit, the court will apply the heightened standard where appropriate under current Eleventh Circuit law.

Malone, 875 F.Supp. at 790; *see also Arrington*, 915 F.Supp. at 1514. The Court finds that as to the § 1983

claims asserted against Roberts and Wallace in their individual capacities, Plaintiff is subject to a heightened pleading standard.

Roberts and Wallace contend that the Complaint alleges they violated abstract rights of "free speech, peaceful assembly, due process, and equal protection," which are not particularized enough to survive a heightened pleading standard. The Eleventh Circuit has affirmed the dismissal of civil rights complaints found to be "insufficient where the allegations it contains are vague and conclusory." *Fullman v. Graddick*, 739 F.2d 553, 556-57 (11th Cir.1984)(holding limited to qualified immunity post-*Leatherman*). The Eleventh Circuit has also held that in all complaints where liability is predicated upon § 1983, "some factual detail is necessary." *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir.1992), cert. denied sub nom. *Deutcsh v. Oladeinde*, 507 U.S. 987, 113 S.Ct. 1586, 123 L.Ed.2d 153 (1993). While the Court finds that Plaintiff's Complaint is factually specific, the Complaint fails to sufficiently allege any "clearly established" constitutional right that Roberts and Wallace violated in their individual capacities.

Roberts and Wallace argue that the doctrine of qualified immunity warrants dismissal of Count 1 against them in their individual capacities. According to the Complaint, Roberts ordered Wayne and the other students displaying the Confederate flag to put the flags away and informed Wayne he would be suspended. ¶¶ 15-18. The Complaint further alleges that Roberts and Wallace formally suspended Wayne. ¶¶ 20, 36. Roberts and Wallace contend that the

objective reasonableness of the suspension of Wayne is clear from the face of the Complaint because there is no support in existing case law, i.e., a "clearly established right," for a student to have an unqualified right to display a confederate flag on school premises.

Government officials may be sued directly under 42 U.S.C. § 1983; however, they enjoy qualified immunity if they have acted in good faith in carrying out their duties. *Kubany v. School Board of Pinellas County*, 818 F.Supp. 1504, 1506 (M.D.Fla.1993)(citing *Kentucky v. Graham*, 473 U.S. 159, 166-67, 105 S.Ct. 3099, 3105-06, 87 L.Ed.2d 114 (1985)). Under Eleventh Circuit precedent, a § 1983 litigant must overcome an arduous burden to defeat the defense of qualified immunity and recover monetary damages from the pocket of a government official.

The purpose of qualified immunity is to shield government officials performing discretionary functions from civil trials and liability if their conduct does not violate " 'clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1149 (11th Cir.1994) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)). The law of qualified immunity is summarized in *Lassiter v. Alabama A & M University, Bd. of Trustees*, 28 F.3d 1146 (11th Cir.1994) (*en banc*):

> I. Qualified immunity protects government officials performing discretionary functions from civil trials (and the other burdens of litigation, including discovery) and from liability if their

conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known. The qualified immunity doctrine means that government agents are not always required to err on the side of caution....

III. For the law to be clearly established to the point that qualified immunity does not apply, the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that what he is doing violates federal law. Qualified immunity is a doctrine that focuses on the actual, on the specific, on the details of concrete cases ...

General propositions have little to do with the concept of qualified immunity. If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant. The line is not to be found in abstractions--to act reasonably, to act with probable cause, and so forth--but in studying how these abstractions have been applied in concrete circumstances. And, as the en banc court recently accepted:

When considering whether the law applicable to certain facts is clearly established, the facts of cases relied upon as precedent are important. The facts need not be the same as the facts of the immediate case. But they do need to be materially similar. Public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases.

> For qualified immunity to be surrendered, preexisting law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances.

Id. at 1149-50 (emphasis in original; internal references omitted). Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815-16, 86 L.Ed.2d 411 (1985).

In this case, the Court finds that Roberts and Wallace are entitled to dismissal on the basis of qualified immunity because the law is not so "clearly established" in such a "concrete and factually defined context" to make it obvious to all reasonable government actors that telling a public school student to put away a confederate flag violated the First Amendment To the contrary, two appellate courts have affirmed district court findings that the display of a Confederate flag was a focal point of racial irritation, offensive to a racial minority, and contributed to violence and the disruption of the school. *Augustus v. School Bd. of Escambia County, Fla.*, 507 F.2d 152, 155 (5th Cir.1975) (district court found that the Confederate flag was racially irritating to many black students); *Melton v. Young*, 465 F.2d 1332, 1334 (6th Cir.1972) (Confederate flag was a "precipitating cause" of tension and disorder), *cert. denied*, 411 U.S. 951, 93 S.Ct. 1926, 36

L.Ed.2d 414 (1973). In *Melton*, the Sixth Circuit affirmed the district court's holding that a student's suspension was a legitimate exercise of a school official's inherent authority to curtail disruption elicited by wearing of the Confederate flag. 465 F.2d at 1334. In light of these holdings, the Court cannot find that the law is so "clearly obvious to all reasonable government actors" that telling a student to put away the Confederate flag, a symbol recognized by the former Fifth Circuit to be racially controversial, violated the First Amendment in a public school setting. The claims in Count I alleged against Roberts and Wallace in their individual capacities are due to be dismissed.

C. Malicious prosecution claim against the Defendants

Count II of the Complaint alleges a state tort claim for malicious prosecution. The Court declines to exercise supplemental jurisdiction over the state tort claim because the claims will "substantially predominate over the claim over which the Court has original jurisdiction" for several reasons. 28 U.S.C. § 1367(c)(2).[2]

First, the qualified immunity defense does not apply

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[2] Alternatively the Court would dismiss Count II because Plaintiff has failed to comply with Fla. Stat. § 768.28(6) which provides that a suit can only be brought against the state or one of its agencies after the claimant has presented its written claim to the relevant agency and the Department of Insurance, and the agency or the Department denies the claim in writing. Fla. Stat. § 768.28(6)(a) (West Supp.1996). The Plaintiff concedes that a written claim for the malicious prosecution against the School Board was not submitted to the Department of Insurance until September 27, 1996, well after the instant Complaint was filed on July 15,1996.

to suits governed by state law. *D'Aguanno v. Gallagher*, 50 F.3d 877, 879 (11th Cir.1995). Therefore, the individual Defendants, Roberts and Wallace, would be forced to provide a defense in federal court on a state claim, even though the Court has dismissed all federal claims against them in their individual capacity. Such a result would circumvent the purposes of the qualified immunity doctrine, as set forth by the Eleventh Circuit in *Lassiter v. Alabama A & M University*, 28 F.3d 1146, 1149-50 (11th Cir.1994)(en banc). The individual Defendants will be forced to spend much more defending the litigation in federal court rather than state court.

Second, the elements required to prove Count I (§ 1983 violation) and Count II (malicious prosecution) differ greatly. Under Florida law, "[i]n order to prevail in a malicious prosecution action, a plaintiff must establish that: (1) an original criminal or civil judicial proceeding against the present plaintiff was commenced or continued; (2) the present defendant was the legal cause of the original proceeding against the present plaintiff as the defendant in the original proceeding; (3) the termination of the original proceeding constituted a bona fide termination of that proceeding in favor of the present plaintiff; (4) there was an absence of probable cause for the original proceeding; (5) there was malice on the part of the present defendant; and (6) the plaintiff suffered damage as a result of the original proceeding." *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So.2d 1352, 1355 (Fla.1994); *Burns v. GCC Beverages, Inc.*, 502 So.2d 1217, 1218 (Fla.1986); *Adams v. Whitfield*, 290 So.2d 49, 51 (Fla.1974).

In the instant case, Plaintiff will be expected to introduce evidence of malice on the part of Roberts and Wallace to prove malicious prosecution, and thus may introduce evidence that would improperly prejudice the jury as to the § 1983 claim against the School Board.[3] More importantly, the Court finds that the malicious prosecution claim would predominate over the § 1983 claim, thus, the Court declines to exercise jurisdiction over Count II.

The Court also finds that supplemental jurisdiction should be declined because the malicious prosecution claim is not "so related to claims in the action within [federal] original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a). According to the Complaint, more than one week passed before Defendants filed a criminal complaint against Wayne under Fla. Stat. § 871.01. During the ensuing week, the media reported the events at Pine Ridge High School and the Ku Klux Klan demonstrated. The expiration of one week between Wayne's suspension and the filing of charges, the subsequent demonstration at the school, and the pursuit of the criminal complaint under Fla. Stat. § 871.01, support the finding that the claims are not part of the same case or controversy.

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[3] A municipality or local governmental body may be held liable under § 1983 for a constitutional violation official with final policy-making authority. *Church v. City of Huntsville*, 30 F.3d 1332, 1343 (11th Cir.1994).

D. Punitive Damages

The School Board and Roberts and Wallace in their official capacity move to strike the punitive damages claims in Counts I of the Complaint. Plaintiff states that no punitive damages are sought against the School Board (or the individuals in their official capacities), thus any such claim as to the School Board is due to be stricken.

Roberts and Wallace also seek to have all punitive damages claims against them in their individual capacities stricken. Since the Court has dismissed the individual capacity claims in Count I, the issue is moot. The Court does not rule on the portion of Defendants' Motions which seek to strike the punitive damages claims in Count II, as the Court has declined jurisdiction over the malicious prosecution claim.

Based on the foregoing, it is ordered as follows:

1. The School Board of Volusia County's Motion to Dismiss (Doc. 4) is DENIED in part and GRANTED in part. Plaintiff's claim for punitive damages against the School Board and Roberts and Wallace in their official capacities is STRICKEN. Count II of the Complaint as to the School Board and Roberts and Wallace in their official capacities is DISMISSED. Pursuant to 28 U.S.C. § 1367(d), the period of limitations shall be tolled for a period of 30 days after it is dismissed.

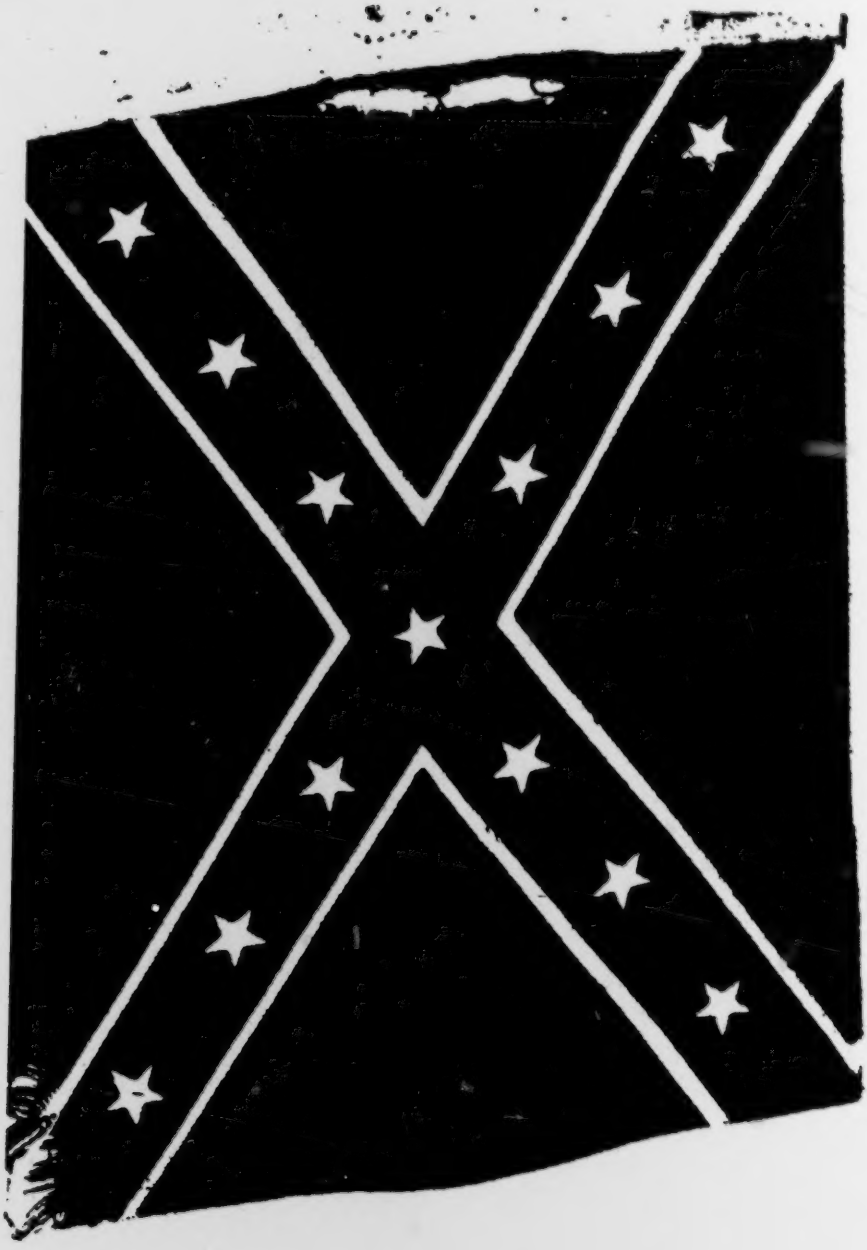
2. Defendant Roberts' Motion to Dismiss (Doc. 6)

is GRANTED in part. The claims in Count I against Defendant Roberts in his individual capacity are hereby DISMISSED, as are any attendant punitive damages claims. Count II of the Complaint as to Roberts is DISMISSED. Pursuant to 28 U.S.C. § 1367(d), the period of limitations shall be tolled for a period of 30 days after it is dismissed.

3. Defendant Wallace's Motion to Dismiss (Doc. 7) is GRANTED in part. The claims in Count I against Defendant Wallace in his individual capacity are hereby DISMISSED, as are any attendant punitive damages claims. Pursuant to 28 U.S.C. § 1367(d), the period of limitations shall be tolled for a period of 30 days after it is dismissed.

February 3, 1997

/s/_____
Anne C. Conway
U.S. District Judge



SCHOOL DISTRICT OF VOLUSIA COUNTY, FLORIDA
Exceptio' 'Student Education/Student Services

NOTICE OF SCHOOL SUSPENSION

Date 12-14-95

Student Name Wayne Denno Alpha I.D. CRZY Sex M Race W
School Pine Ridge High Grade 10 Attendance Period 2nd
ESE Program [X] Yes [ ] No If yes, (ESE Program) _____
Parent's Name Linda Denno Phone 532-9514 (Home) 407-830-1985 (Work/Emergency)

THE ABOVE-NAMED STUDENT HAS BEEN GIVEN ORAL/WRITTEN NOTICE OF THE CHARGES AGAINST HIM/HER AND HAS BEEN INFORMED OF HIS/HER RIGHT TO DUE PROCESS.

F-1

RW Initial .... A. An explanation of the evidence has been made to the student and he/she has had an opportunity to present his/her version.

RW Initial ..... 1. Student does not deny charges.

RW Initial ..... 2. This hearing was held before the student was removed from school.

RW Initial ..... 3. Parent called by telephone. *Date* 12-13-95 *Time* 8:53 am *Signature* R Wallace for Dennis Robert.

_____ Initial ..... 4. Unable to reach parent by telephone.

_____ Initial .... B. It was not feasible to have a hearing prior to removing the student from the school because the student's presence endangered persons or property or threatened disruption of academic process.

_____ Initial ..... 1. The necessary hearing will follow within 72 hours.

The student is hereby suspended from school attendance for a period of 9 *school days. This suspension begins on* 12-14-95. *The student is to return to school on* 1-10-96.

Reason(s) for suspension: Attempting to incite riot by parading Confederate flag during lunch period / became insubordinate to administrator and disruptive in student resource center by continuing to incite students / also threw objects in the resource center causing disruption and potentially dangerous situation.

Previous Referrals 21 Source of weapon or firearm: Ø Controlled Substance Field Test: Positive__ Negative __

During the period of suspension, your child is not to appear on school grounds, attend or participate in school sponsored activities. I strongly urge that he/she remain indoors at home occupied with school work during the regular school hours. It is expected that students who have been suspended will make up class work which has been missed. According to School Board Policy #206, "Make-up work for unexcused absences may be assessed a letter grade penalty."

You are requested to accompany the student on return to school. [ ] Yes [X] No

This is your child's 5th suspension this school year. Expulsion recommended. [X] Yes [ ] No

A PARENT OR GUARDIAN WHO IS DISSATISFIED WITH THE ABOVE DECISION AND WHO DESIRES AN ADDITIONAL HEARING MUST CALL THE SCHOOL PRINCIPAL WITHIN 24 HOURS AFTER RECEIVING THIS REPORT.

NAME (Person to contact, if other than principal, for further information)	TITLE
Robert Wallace RW.	Asst. Principal
SIGNATURE (Principal) Dennis Roberts	SCHOOL PHONE NUMBER 407-328-6800

The principal or designated representative may suspend a student only in accordance with the rules of the district school board. Each suspension, and the reason therefore, shall be reported in writing within 24 hours, to the Student's parent or guardian and to the superintendent. Grounds for disciplinary action are contained within district school board rule. Source of Authority — Florida Statute 232.26(1).

White: School Yellow: ESE/SS Office Pink: Parent Goldenrod: Superintendent

Supreme Court, U.S.
FILED
SEP 22 2000
CLERK

(2)

No. 00-306

In The

Supreme Court of the United States

LINDA DENNO, as parent, legal guardian and next friend for WAYNE DENNO,

Petitioners,

v.

SCHOOL BOARD OF VOLUSIA COUNTY, DENNIS ROBERTS, an individual, and ROBERT WALLACE, an individual,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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20 pp

PARTIES TO THE PROCEEDING

Petitioner is Linda Denno as parent, legal guardian and next friend for her son, Wayne Denno. Petitioner was plaintiff in the United States District Court for the Middle District of Florida and appellant before the United States Court of Appeals for the Eleventh Circuit.

Respondents are the Volusia County School Board, a public school board organized under the constitution of the State of Florida, Dennis Roberts, dividually and as an employee of the School Board of Volusia County, Florida, and Robert Wallace, individually and as an employee of the School Board of Volusia County, Florida. Respondents were defendants and appellees below.

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STATEMENT OF THE CASE

Two discrete procedural events resulted in the disposition of this case in the district court. The case against respondents, Dennis Roberts (Roberts) and Robert Wallace (Wallace), was dismissed by order of the district court and that dismissal was affirmed by the appellate court. Denno's action against respondent, Volusia County School Board (VCSB), concluded with the district court's entry of summary judgment in favor of VCSB. That judgment was affirmed by the appellate court.

In his Statement of the Case, Denno asserts that, "[s]ince this case was decided by the district court on motions to dismiss and for summary judgment, the facts as set forth in the pleadings are deemed true . . . ." Petition, at 4. While Denno's statement is accurate with respect to that portion of the case decided on motion to dismiss, it is inaccurate with respect to that portion of the case concluded by the entry of summary judgment.[1]

Denno's "Statement of the Case" sets forth a mixture of facts including: (1) facts as alleged in his complaint; (2) facts supported by record evidence; (3) undisputed facts; and (4) disputed facts which were neither alleged in the complaint nor supported by record evidence. Although Denno appeals both an order of dismissal and summary judgment, he fails to distinguish between the four categories of facts appearing in his Statement of the Case.

---

[1] Rule 56(e) "requires the non-moving party to go beyond the pleadings and by [his or her] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

Where necessary, respondents will distinguish between allegations, facts adduced during discovery, undisputed facts, and disputed facts which were neither pled nor supported by record evidence. Although he has previously argued the existence of certain facts, Denno neither pled nor supported with record evidence the following facts set forth at page 7 of his petition:

> After returning to school, Denno sought to expunge the suspension. Petitioners met with Principal Rowe who declined the request without explanation. Through counsel, Petitioners immediately contacted the School Board's General Counsel to request further review by the Assistant Superintendent. They were ignored. When Petitioners' counsel then contacted the Assistant Superintendent directly, he was informed that no formal review would be undertaken on the grounds that Petitioners had waited too long.

Petition, at 7.

Notwithstanding Denno's suggestion that his attempt to secure review of his suspension was allegedly frustrated by respondents, no record evidence supported such contentions and both the district court and the appellate court found that Denno simply failed to timely seek review of his suspension. (C-13-14); (A-20-21).

REASONS FOR DENYING THE WRIT

In his attempt to articulate some issue warranting review by this Court, Denno poses four questions arising out of the two discrete conclusions of the district and

appellate courts. Both courts found that: (1) the doctrine of qualified immunity protected the individual defendants from personal liability to Denno; and (2) the school board was not liable to Denno because the prohibition against his display of a Confederate flag was not the result of a formal policy, custom or practice, or decision by an official with final policymaking authority.

As to the individual defendants, Denno attempts to capture this Court's attention by asserting that the Eleventh Circuit Court of Appeals ignored or rejected this Court's decision in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). The opinion of the appellate court does not support Denno's argument. Throughout its opinion, the appellate court repeatedly acknowledged *Tinker* as one of two Supreme Court cases which "dominates the legal landscape" in the area of student speech.

Denno's assertion that "the cornerstone of the appellate majority's opinion . . . is the belief that *Fraser* has eroded the holding in *Tinker*" is likewise without merit. The appellate court reached no such conclusion but instead found that, in determining whether Denno had a clearly established right to display a Confederate flag, both *Tinker* and *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), were applicable and that the individual defendants were to be charged with the knowledge of both cases.

Denno further complains that, in determining whether he had a clearly established right to display a Confederate flag, the appellate court failed to first determine the existence of such a right. Denno never requested

that either the district or appellate court decide the substantive constitutional right to display a Confederate flag prior to addressing the issue of qualified immunity. Having, until now, failed to ask any court to do so, Denno cannot be heard to complain that the lower courts failed to determine the substantive constitutional right.

As to respondent VCSB, Denno argues that this Court must review the Eleventh Circuit's decision in order to prevent governmental entities from improperly insulating themselves against liability under 42 U.S.C. §1983. Summary judgment was entered in favor of VCSB because Denno was unable to adduce any record evidence to create a genuine issue as to whether the prohibition of the display of a Confederate flag was the result of a formal policy, custom or practice, or decision by an official with final policymaking authority. Accordingly, the only issue presented with respect to the school board is whether, in response to a motion for summary judgment, the nonmovant who will bear the burden of proof at trial must designate some fact which creates a genuine issue for trial. This court has previously answered this question in the affirmative and there is no compelling reason to revisit this issue.

ARGUMENT

I.

NEITHER THE DISTRICT COURT NOR THE APPELLATE COURT REJECTED OR IGNORED *TINKER*.

Denno argues that a constitutional right which is clearly established by this Court cannot thereafter be

rendered unclear by "after-the-fact, non-binding decisions of lower courts." Petition, at 9. This question is not raised by the decisions of the lower courts because neither the district court nor the appellate court found that any non-binding decision of a lower court rendered this Court's decisions unclear.

The district and appellate court determined that Roberts and Wallace were protected against personal liability to Denno based on the doctrine of qualified immunity. In reaching its decision, the appellate court observed that "[q]ualified immunity shields government official from both suit and liability if their conduct violates no clearly established right of which a reasonable person would have known." *Denno v. School Board of Volusia County, Florida*, 218 F.3d 1267, 1269-70 (11th Cir. 2000) (A-2), citing *Santamorena v. Georgia Military College*, 147 F.3d 1337, 1339-40 (11th Cir. 1998). Consequently, the appellate court undertook the task of determining whether pre-existing law clearly established Denno's right to display a Confederate flag at school. *Denno* at 1271 (A-5).

In order to determine whether Denno had a clearly established right to display a Confederate flag at school, the appellate court properly "examined the legal landscape at the time of the individual defendants' actions" and observed that the landscape in the area of student speech was dominated by *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). *Denno* at 1271 (A-5-6).

In *Tinker*, this Court held that a student has a First Amendment right to display a black armband at school, notwithstanding the school officials' fear that display of the symbol would create a disturbance, so long as there was no more than an "undifferentiated fear or apprehension of a disturbance." *Denno* at 1271 (A-6) citing *Tinker* at 508.

In *Fraser*, after stating that one of the purposes of public education is to inculcate the habits and manners of civility as values conducive both to happiness and to the practice of self-government, this Court stated:

> These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of the others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.

Denno at 1271 (A-6-7) citing *Fraser* at 681.

The appellate court acknowledged that these two cases dominate the legal landscape in the area of student speech and determined that a reasonable governmental official is charged with the knowledge of both cases. *Denno* at 1272 (A-9). The appellate court determined that "[to] the extent a reasonable school official viewed the relevant legal landscape as including the more flexible

Fraser standard, the official would look not merely to the reasonable risk of disruption standard (the *Tinker* standard), but would also balance the freedom of Denno and the similarly situated students to advocate unpopular and controversial views against the school's interest in teaching students the boundaries of socially appropriate behavior." *Denno* at 1275 (A-16). Accordingly, the court could not conclude that the actions of the individual defendants in this case violated clearly established First Amendment rights. *Denno* at 1275 (A-17-18).

Denno asserts that the appellate court improperly held that "a reasonable school official might conclude that *Tinker* is no longer 'clearly established' law due to subsequent decisions of non-binding courts." Petition, at 10. Denno further asserts that, in reaching that holding, the appellate court improperly relied on the decisions of the Seventh Circuit Court of Appeals in *Muller by Muller v. Jefferson Lighthouse School*, 98 F.3d 1530 (7th Cir. 1996) and a Kansas district court in *West v. Derby Unified School Dist. No. 260*, 23 F. Supp.2d 1223 (D. Kan. 1998), *aff'd*, 206 F.3d 1358 (10th Cir. 2000) (petition for *certiorari* pending) to conclude that it would not be unreasonable for a school official to prohibit Denno from displaying his Confederate flag. Petition, at 10. Denno argues that the appellate court was without authority to look to "persuasive opinions when the law of the Supreme Court and circuit resolve the issue." Petition, at 10. Denno specifically asserts that, as a result of its reliance on the non-binding, after-the-fact, dicta, the appellate court found *Tinker* to be no longer clearly established (Petition, at 10) and implies that, based on its review of the persuasive authority, the

appellate court found *Tinker* to be "archaic," and "non-binding." Petition, at 12.

Denno's argument is without merit. Rather than finding *Tinker* to be "no longer clearly established", "archaic," and "non-binding" as Denno suggests, the appellate court expressly stated that *Tinker* is one of two Supreme Court cases that "dominate the legal landscape" in the area of student speech. *Denno* at 1276 (A-5-6) and that a reasonable official would be charged with the knowledge of both cases. *Denno* at 1272 (A-9). The appellate court did not find that the doctrine of qualified immunity protected the individual defendants from personal liability because *Muller* and *West* nullified *Tinker*. The appellate court found the individual defendants qualifiedly immune because a reasonable school official charged with the knowledge of both *Tinker* and *Fraser* "may have been led to the view that the legal landscape permitted application of the more flexible *Fraser* standard where the speech involved intrudes upon the function of the school to inculcate manners and habits of civility." *Denno* at 1274 (A-14). Although Denno argues that the appellate court reached its decision by ignoring *Tinker*, it is clear from the opinion that the court reached its decision by considering both *Tinker* and *Fraser*.

To the extent the appellate court relied on *Muller* and *West*, it did not do so to support a conclusion that *Tinker* is "archaic" but, instead, to note that other jurists addressing similar facts and issues included a consideration of *Fraser* in their analysis. After analyzing *Muller* and *West*, the appellate court did not determine that *Tinker* was now inapplicable but rather that "we cannot conclude that . . . the *Tinker* standard should apply in the

instant case to the exclusion of the *Fraser* standard." *Denno* at 1274 (A-13). Although Denno insists the appellate court ignored *Tinker*, it is clear beyond reasonable dispute that it did not do so. The appellate court simply refused to ignore *Fraser*.

II.

THE APPELLATE COURT DID NOT HOLD THAT *TINKER* HAS BEEN ERODED BY *FRASER*

Denno argues that the appellate court found this Court's opinion in *Fraser* eroded the clarity of *Tinker*. Like the first question presented, Denno creates a straw argument to attack. In finding that the individual defendants were protected by qualified immunity, the appellate court did not find that *Tinker* has been eroded by *Fraser* as suggested by Denno. Although Denno states that "[t]he cornerstone of the appellate majority's opinion on rehearing is the belief that *Fraser* has eroded the holding in *Tinker*" (Petition, at 13), he does not cite to the appellate opinion to support his proposition. The reason for the lack of citation to the appellate opinion is that the appellate court did not conclude that the holding of *Tinker* has been eroded. Indeed, the appellate court repeatedly referred to the "*Tinker-Fraser*" legal landscape and recognized that the "legal landscape" regarding student speech is "dominated by" both *Tinker* and *Fraser*. *Denno* at 1271 (A-5-6). Rather than rejecting *Tinker*, the appellate court acknowledged *Fraser* and observed that "[t]o the extent that a reasonable school official viewed the relevant legal landscape as including the more flexible *Fraser* standard, the official would look not merely to the reasonable risk

of disruption (the *Tinker* standard), but would also balance the freedom of Denno and the similarly situated students to advocate unpopular and controversial views against the School's interest in teaching students the boundaries of socially appropriate behavior." *Denno* at 1275 (A-16). Although Denno argues that the appellate court applied *Fraser* rather than *Tinker*, the court clearly and repeatedly stated that both cases appeared in the legal landscape and that, in determining whether an individual violated clearly established law, the official would be charged with the knowledge of both *Tinker* and *Fraser*. *Denno* at 1272 (A-9).

Denno refers to the "staggering implications" on student speech in the event the appellate court's opinion is allowed to stand. Petition, at 16. Denno describes a parade of horribles in which, absent review by this Court, public school students may, without recourse, be deprived of all symbolic speech. Denno's suggestion that the appellate opinion will result in students being left without recourse against improper restraints on student speech is without merit. The appellate opinion did not address a student's right to display a Confederate flag or any other symbol on school grounds during school hours. The appellate court was asked to address the issue of whether that right, if it exists, is so clearly established that a governmental official can be held personally liable to a student for prohibiting its display. It did not find that students may be prohibited from displaying Confederate flags or any other symbol. The appellate court merely found that Denno's right to display a Confederate flag on school property during school hours was not so clearly established that the individual assistant principals could

be held personally liable to Denno for prohibiting him from displaying that symbol.

III.

DENNO NEVER ASKED ANY COURT TO DETERMINE THE EXISTENCE OF THE SUBSTANTIVE RIGHT OF A STUDENT TO DISPLAY A CONFEDERATE FLAG BEFORE DETERMINING THE ISSUE OF QUALIFIED IMMUNITY

Denno complains that the appellate majority "refused to explicitly determine whether Denno or any other public high school student has the constitutional right to the nondisruptive display of a Confederate battle flag." Petition, at 16. The appellate court did not "refuse" to determine the existence of such a substantive right. Neither party asked the court to make that determination. *Denno* at 1275 n.5 (A-14). Now for the first time, Denno complains that it should have done so. By failing to request that the appellate court determine the existence of the substantive right before proceeding to the issue of qualified immunity, Denno should be estopped from raising it now.

Furthermore, it is not clear that this Court requires, without exception, that the existence of the constitutional right be determined before addressing the issue of whether that right is clearly established in the context of qualified immunity. In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), this Court stated that the "better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all" and that "[n]ormally, it is only then that a court

should ask whether the right allegedly implicated was clearly established." *Lewis*, 523 U.S. at 840-842 n.5. The Eleventh Circuit has not interpreted this Court's statement to mean that it is without discretion to analyze a particular qualified immunity case without first deciding whether the constitutional right exists. *Santamorena v. Georgia Military College*, 147 F.3d 1337, 1343 (11th Cir. 1998). Indeed, in this case, the appellate court acknowledged that, generally, the better approach in determining qualified immunity is to first determine the existence of the substantive right. *Denno* at 1275 n.5 (A-14). However, the Court expressly concluded that this case constituted an exception to the usual analysis and that neither party argued that the Court must proceed otherwise. *Id.*

Denno argues that a court must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right before determining whether that right was clearly established at the time of the alleged violation. Petition, at 16, citing *Wilson v. Layne*, 526 U.S. 603, 609 (1999). However, even though the lower court in *Wilson* "declined to decide whether the actions of the police violated the Fourth Amendment," *Wilson*, 526 U.S. at 608, this Court did not find that the lower court committed reversible error by proceeding directly to the issue of qualified immunity. Similarly, even in the event this Court determines that the appellate court should have addressed the substantive constitutional right before proceeding with its analysis of qualified immunity, the court's failure to do so does not warrant review.

IV.

TO OVERCOME A MOTION FOR SUMMARY JUDGMENT, THE NON-MOVANT MUST COME FORWARD WITH SOME EVIDENCE TO SHOW A GENUINE DISPUTE OF A MATERIAL FACT

Denno asks this Court to review the summary judgment in favor of VCSB entered by the district court and affirmed by the Eleventh Circuit Court of Appeals on the issue of VCSB's liability. Denno argues that review of this issue is necessary to prevent school boards from improperly insulating themselves from liability under §1983 simply by delegating all controversial decisions to individual schools subject solely to some non-functional omnibus grievance procedure. Petition, at 21.

The issue, as framed by Denno, is not present in this case. The issue with respect to the liability of VCSB is whether the opponent of a motion for summary judgment who bears the burden of proof at trial must come forward with some evidence to show a genuine dispute of a material fact. In this case, Denno simply failed to do so.

A government cannot be held liable under §1983 on a theory of respondeat superior. *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 691 (1978). In order to hold a governmental entity liable pursuant to §1983, a plaintiff must establish any one of the following: (1) a formal policy authorizing the prohibited act; (2) a custom or practice of engaging in the prohibited act; or (3) a decision by a person with final policymaking authority to engage in the wrongful act. See *Monell* at 690-691, and *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986). Drawing on this Court's opinion in *City of St.*

Louis v. Praporinik, 485 U.S. 112 (1988) (plurality opinion), the Eleventh Circuit has squarely held that "[f]inal policymaking authority over a particular subject area does not vest in an official whose decisions in the area are subject to meaningful review." *Scala v. City of Winter Park*, 116 F.3d 1396, 1404 (11th Cir. 1997).

Denno concedes that VCSB had no formal policy prohibiting the display of Confederate flags by students. Petition, at 19. Denno failed to introduce any record evidence to support his argument that VCSB had a prior custom or practice of prohibiting students from displaying the Confederate flag. *Denno* at 1277-78 (A-22-23). In fact, as noted by the appellate court, Denno himself admitted in his deposition that, until the incident giving rise to this lawsuit, Denno had never been prohibited from displaying a Confederate flag nor had he ever heard of any public school student being prohibited from or disciplined in response to displaying such a flag. *Denno* at 1277-78 (A-14-15).

Both the district and appellate courts found that the individuals who allegedly made the decision to prohibit Denno from displaying the Confederate flag did not possess final policymaking authority in the area of student speech because their decisions were subject to meaningful review. *Denno* at 1277 (A-21).

Both the district and appellate courts found that the Code of Student Conduct and Discipline provided a procedure for a meaningful review of the individual official's decision regarding student speech. *Denno* at 1277 (A-21). The undisputed evidence established that Denno simply failed to timely avail himself of the procedure utilized by

VCSB to review the decisions of its employees. *Denno* at 1277 (A-20-21). Accordingly, summary judgment was appropriate.

Now, for the first time, Denno claims VCSB historically does not review the decisions of its school principals with respect to the rights of student speech. Petition, at 20. Similarly, Denno now suggests that VCSB does not follow its grievance procedure. Petition at 20-21. These assertions are without record support. If such evidence exists, the appropriate time to have referenced it was in response to VCSB's motion for summary judgment in the district court not in a petition for writ of certiorari to the United States Supreme Court.

Denno asserts that this case requires this Court to clarify that "meaningful review" must be more than a "catch-all" grievance procedure (particularly one which is not followed by the governmental body). In fact, this case does not present an issue nearly that attractive. The question presented in this case is whether in response to VCSB's motion for summary judgment Denno was required to come forward with some evidence to raise a genuine dispute as to whether Policy 208 failed to provide an opportunity for meaningful review of the administrators' decision. That a non-movant is required to do more than rest on his pleadings and by his own affidavits or depositions, answers to interrogatories, and admissions on file designate specific facts showing that there is a genuine issue for trial was clearly established in *Celotex v. Catrett*, 477 U.S. 317, 324 (1986). Although Denno now argues that VCSB ignored his request for review, historically avoided review of its principals, and did not follow

its review procedure, Denno failed to support these arguments in the district court with any affidavit, deposition, answer to interrogatory, or admission on file. The undisputed evidence was that Denno failed to timely avail himself of the review procedure. Accordingly, summary judgment was appropriately entered against Denno and in favor of VCSB. There is no compelling reason for this Court to revisit the issue of whether a non-movant who bears the burden of proof at trial must come forward with some evidence to raise a genuine dispute in response to a proper motion for summary judgment.

CONCLUSION

For the reasons set forth above, Denno's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
OCT 11 2000
CLERK

(3)

No. 00-306

IN THE
Supreme Court of the United States

LINDA DENNO, AS PARENT, LEGAL GUARDIAN AND NEXT FRIEND FOR WAYNE DENNO,
Petitioners,

V.

SCHOOL BOARD OF VOLUSIA COUNTY, DENNIS ROBERTS, AN INDIVIDUAL AND ROBERT WALLACE, AN INDIVIDUAL,
Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY BRIEF

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Counsel of Record
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Linda Denno and Wayne Denno

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

In accordance with Sup. Ct. R. 15.6, Petitioners submit the following reply to address new points in Respondents' Brief in Opposition.

I & II.

NO NEW POINTS ARE RAISED IN THESE ARGUMENTS

Respondents contentions that the Court of Appeals did not reject *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), nor deem *Tinker's* controlling nature eroded by *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), raise no new points. Since a simple review of the opinions of the Court of Appeals will permit the Court to assess these contentions, no additional argument by Petitioners is necessary.

III.

PETITIONERS HAVE NOT WAIVED THEIR RIGHT TO A DETERMINATION OF THE SUBSTANTIVE CONSTITUTIONAL RIGHT OF A STUDENT TO THE DISPLAY OF A CONFEDERATE BATTLE FLAG

For the very first time in their Brief in Opposition, Respondents argue that Petitioners are estopped from seeking a determination of the

substantive constitutional right of Denno to display a Confederate battle flag. Respondents' claim of estoppel is predicated on a curious footnote in the majority's opinion on *sua sponte* rehearing.

> Neither party has argued that we must decide the *merits* of the substantive constitutional issue before addressing qualified immunity. And we believe that this appeal is one of those exceptional cases in which we are not required to do so.

Denno v. School Board of Volusia County, Florida, 218 F.3d 1267, 1275 n.5 (11th Cir. 2000) A14.

At all times since the inception of this case in 1996, Denno has vehemently argued that he possesses the substantive constitutional right to display a Confederate battle flag. Indeed, in its original opinion, the Court of Appeals agreed that Denno possessed such a substantive constitutional right under *Tinker*. *Denno*, 182 F.3d 780, 785 B9.

At no time did Denno concede or even suggest that the Court of Appeals could dispense with its obligation under *Wilson v. Layne*, 526 U.S. 603, 609 (1999) to decide the constitutional question before addressing the qualified immunity question. Significantly, Respondents never argued or requested such an approach by the lower court.

Respondents' estoppel argument is the penultimate "gotcha." The application of *Wilson v. Layne* was never an issue in the Court of Appeals.

Neither party briefed the question. The Court of Appeals never raised the question. Yet, Respondents now have the audacity to argue that Denno is estopped simply because he never expressly asked the Court of Appeals to follow the controlling law of this Court.

Denno's has consistently sought to vindicate his substantive constitutional right to the non-disruptive display of a Confederate battle flag. Respondents cannot evade review of this issue on estoppel grounds.

IV.

DENNO SOUGHT REVIEW OF HIS SUSPENSION ONLY TO BE REBUFFED

In their Statement of the Case and argument, Respondents incorrectly state that Denno never presented record evidence of his efforts to seek review of his suspension. Respondents' Brief at 2 & 15. Quite to the contrary, the district court record was replete with evidence of Denno's timely attempts to seek internal review.

First, not even Respondents contest the fact that Petitioners met with Principal Rowe on January 22, 1996, as the first step in the internal grievance process. Then, on January 30, 1996, Denno's counsel wrote the School Board's general counsel urging the School Board to uphold Denno's grievance.[1] On February 1, 1996, Principal Rowe's conclusory denial of Denno's

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[1] This evidence is found in the appellate record at R3-56-28&29.

grievance was transmitted by facsimile by the School Board's general counsel.

Denno's counsel repeatedly telephoned the School Board's general counsel seeking to advance the grievance process. None of these calls were returned. Accordingly, Denno's counsel wrote the School Board's general counsel on February 28, 1996 seeking further review of Denno's suspension.[2] This letter, too, was ignored.

On April 4, 1996, Denno's counsel bypassed the School Board's reticent general counsel and wrote the Assistant Superintendent renewing Denno's request for review.[3] Finally, in response to this renewed demand for grievance review, the Assistant Superintendent responded with the position that Denno had waived his right to review by waiting too long. Conveniently, the Assistant Superintendent never acknowledged Denno's repeated efforts to initiate further review through the School Board's general counsel.

Certainly, Respondents are correct that Petitioners were obliged to produce evidence of their attempt to pursue the grievance procedure. This the Petitioners did. Not even the district court held that Denno failed to establish a genuine issue of material fact on this issue.[4]

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[2] This evidence is found in the appellate record at R3-56-30&31. A copy of this letter is submitted as Appendix G.

[3] This evidence is found in the appellate record at R3-56-32&33. A copy of this letter is submitted as Appendix H.

[4] The district court merely found that "the evidence

Thus, the issue of whether a school board may avoid liability under 42 U.S.C. § 1983 by first abdicating decisions to individual schools, and then relying on a "catch-all" grievance procedure (particularly one such as the Respondents' which is not followed in practice) is squarely before the Court for review. To be sure, the conduct of the School Board in this case is disturbing. At every turn, Respondents have sought to employ bureaucratic trick and artifice to avoid review on the merits.

CONCLUSION

For the reasons set forth in the petition and above, the petition for writ of certiorari should be granted.

Respectfully submitted,

Frank R. Jakes
Counsel of Record
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Attorneys for Petitioners Linda Denno and Wayne Denno

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suggests that Denno's request for review was denied because the request to the area assistant superintendent was not made within the applicable time limits..." C14 (emphasis supplied). Naturally, a court cannot "weigh" conflicting evidence when ruling on a motion for summary judgment.

APPENDIX G

[Letterhead Omitted In Printing]

[Addresses Omitted In Printing]

FILE NO. 36629.94880

February 28, 1996

VIA FACSIMILE AND U.S. MAIL

Richard A. Kizma
School District of Volusia County
P.O. Box 2118
200 North Clara Avenue
DeLand, FL 32721-2118

Re: *Wayne Denno*

Dear Rich:

My telephone messages for the last couple of weeks have gone unanswered. I had hoped to discuss the matter of Wayne Denno's grievance directly with you in an informal manner. However, since that was not possible, I am writing in an effort to bring the matter to fruition.

Suffice to say that Wayne Denno and his mother, Linda, were very disappointed with the perfunctory rejection of their grievance by Principal Rowe. Moreover, we have received no information as to the timing of the hearing before the Assistant Superintendent. Clearly, if the school district is just "going through the motions", a final denial of the grievance should save everyone's time and effort. The Dennos can then pursue their formal legal remedies.

I look forward to hearing from you as soon as possible, but certainly before the end of the month. If I do not hear from you by that time, we will interpret the silence as a statement that the school district has no intentions of

it providing the Dennos a full and fair hearing as to their grievance.

Sincerely,

JOHNSON, BLAKELY, POPE,
BOKOR, RUPPEL & BURNS, P.A.

/s/ Frank R. Jakes
Frank R. Jakes

FRJ/dls
Enclosure
33254

cc: Linda Denno

APPENDIX H

[Letterhead Omitted In Printing]

[Addresses Omitted In Printing]

FILE NO. 36629.94880

April 4, 1996

VIA FACSIMILE

Assistant Superintendent Lee Britton
School District of Volusia County
P.O Box 2118
200 North Clara Avenue
DeLand, Florida 32721-2118

Re: Wayne Denno Grievance

Dear Mr. Britton:

As you should be aware, Wayne Denno, a student at Pine Ridge High School in Volusia County and his mother, Linda Denno, have filed a grievance regarding his suspension on December 14, 1995 for displaying a three inch by five inch confederate battle flag during lunch period. Following an initial conference with Principal Sandra Rowe on January 22, 1995, during which Ms. Rowe did nothing other than listen to Mrs. Denno and her son, Ms. Rowe issued an unexplained and perfunctory denial of the grievance. I have attached a copy of her unexplained denial of the grievance.

Since that time, we have been endeavoring to secure a review of the grievance denial in accordance with the Code of Student Conduct and Discipline for the School District of Volusia County. Unfortunately, we have received no cooperation out of the School Board in the scheduling of this hearing. Therefore, in an effort to possibly avert the necessity for federal civil rights litigation,

on behalf of Wayne Denno and his mother Linda Denno, demand is made upon the Volusia County School Board to conduct a review of Ms. Rowe's initial denial of the Dennos' grievance. Your office my [sic] coordinate the timing of this hearing directly with my office.

Further, to permit the Dennos a meaningful review of the denial of their grievance, demand is made to provide the Dennos with all internal statements, documents, files and records relating to the December 14, 1995 incident. In this respect, we are advised that the incident was captured on a video tape controlled by school officials. This video tape must be made available to the Dennos. Moreover, at such time as the second hearing is scheduled, the Dennos demand the presence of Assistant Principal Roberts so that he may be examined under oath. Lastly, given the fact that Assistant Principal Roberts is the administrator responsible for taking the action which has given rise to the grievance, the Dennos request access to Mr. Roberts' personnel file.

I look forward to hearing from you at your earliest opportunity, but certainly no later than April 10, 1996.

Sincerely,

JOHNSON, BLAKELY, POPE,
BOKOR, RUPPEL & BURNS, P.A.

/s/ Frank R. Jakes
Frank R. Jakes

FRJ/dls
Enclosures

cc: Richard Kizma, Esq.
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